SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 520

FRED G. DRUMMOND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 21, 1944.

—5670

[fol. a] [Caption omitted]

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 805. Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

FRED G. DRUMMOND, Defendant

COMPLAINT—Filed April 29, 1942

Comes now the above-named plaintiff, the United States of America, by its undersigned attorney, Whit Y. Mauzy, the duly appointed, qualified and acting United States Attorney in and for the Northern District of Oklahoma, who brings, files and prosecutes this action in this court at the special direction of the Attorney General of the United States of America and at the request of the Secretary of the Interior of the United States, for and on behalf of the United States and for and on the further behalf of George Pitts, Osage Allottee No. 761, who resides in Osage County, State of Oklahoma, Northern District of Oklahoma, and within the jurisdiction of this court, and alleges and states:

I

That the defendant, Fred G. Drummond, is a resident of Osage County, State of Oklahoma.

II

That jurisdiction is vested in this court under Revised Statutes, Sections 563 and 629 and amendments thereto, now being Section 41, Title 28, U. S. C. A., and under Section 274-d, Chapter 512, 48 Stat. L. Page 955, as amended.

III

Plaintiff further alleges and states that George Pitts, [fol. 2] Osage Allottee No. 761, is a full blood, restricted

member of the Osage Tribe of Indians, whose property has been at all times within the jurisdiction and under the care, protection, supervision and control of the United States and, pursuant to acts of Congress, the United States has at all times herein mentioned, had the supervision and control of the lands herein described.

IV

That said Osage Tribe of Indians was originally the owner of all the lands situated in Osage County, Oklahoma, which was formerly the Osage Indian Reservation under and by virtue of certain acts of Congress and treaties as follows:

Act of July 15, 1870, (16 Stat. L. 335).
Act of July 5, 1872, (17 Stat. L. 228).
Act of March 3, 1873, (17 Stat. L. 530).
Act of March 3, 1883, (22 Stat. L. 603).
Act of March 2, 1899, (30 Stat. L. 990).
Act of June 28, 1906, (34 Stat. L. 539).
Act of March 3, 1929, (41 Stat. L. 1249).
Act of March 2, 1929, (45 Stat. L. 1479).
Act of June 24, 1938, (53 Stat. L. 1034).

and by deed to said Osage Tribe executed on behalf of the Cherokee Indians on June 14, 1883, pursuant to acts of Congress above referred to, to-wit:

Act of March 3, 1873 and Act of March 3, 1883.

V

Plaintiff further alleges that during his lifetime the said George Pitts married Mamie Fletcher Pitts and was her surviving husband at the date of her death on or about the 24th day of May, 1937. That the said Mamie Fletcher Pitts was a duly enrolled and allotted member of the Osage Tribe of Indians, being enrolled opposite number 156, and is shown by the official roll of the Osage Tribe of Indians to have been born on June 1, 1876, and to have been a full blood member of said tribe.

[fol. 3]

VI

Plaintiff further alleges that as such Osage allottee the said Mamie Fletcher Pitts was the owner at the time of her death of certain lands allotted to her as a member of the

Osage Tribe and that she had acquired, by inheritance from deceased relatives who were themselves members of the Osage Tribe, or by partition among members of the Osage Tribe, certain lands hereinafter set out.

VII

Plaintiff further shows that at no time during her life did the Secretary of the Interior ever issue to the said Mamie Fletcher Pitts a certificate of competency authorizing her to sell or convey any of her lands, and this plaintiff alleges the fact to be that at no time during her life could the said Mamie Fletcher Pitts alienate or encumber any of the lands hereinafter described, without the written consent of the Secretary of the Interior.

VIII

Plaintiff further alleges that the said Mamie Fletcher Pitts died on or about the 24th day of May, 1937, seized and possessed of all the lands hereinafter described, and that her estate was duly probated in the County Court of Oklahoma in probate cause number 4347, and that on the 9th day of September, 1938, said County Court of Osage County found and determined the heirs of the said Mamie Fletcher Pitts, and entered its order determining, adjudging and decreeing that George Pitts, her husband, succeeded and inherited from the said Mamie Fletcher Pitts the following described lands, to-wit:

An undivided ¼th interest in:

Southwest Quarter of Northeast Quarter (SW¼ of NE¼);

Northwest Quarter of Southeast Quarter (NW¼ of SE¼)

South Half of Southeast Quarter (S½ of SE¼) of Section 26, Township 28, Range 6;

Lots 3 and 4;

South Half of Northwest Quarter (S½ of NW¼) of Section 3, Township 24, Range 4;

West Half of Southeast Quarter (W½ of SE¼);

West Half of Northeast Quarter of Southeast Quarter (W½ of NE¼ of SE¼);

West Half of Southeast Quarter of Southeast Quarter (W½ of SE¼ of SE¼) of Section 31, Township 26, Range 6;

Lots 1 and 2;
South Half of Northeast Quarter (S½ of NE¼) of Sec
tion 1;
South Half of Northwest Quarter of Southwest Quarte
(S½ of NW¼ of SW¼);
North Half of North Half of Northeast Quarter of South
west Quarter (N½ of N½ of NE¼ of SW¼) of Sectio
2, Township 20, Range 10;
An undivided 1/12th interest in:
Northwest Quarter (NW¼) of Section 32, Township 2
Range 6;
East Half of Northeast Quarter (E½ of NE¼);
Southwest Quarter of Northeast Quarter (SW¼ o
NE¼);
Southeast Quarter of Northwest Quarter (SE¼ of NW¼
of Section 33, Township 25, Range 4;
Southeast Quarter (SE¼) of Section 9, Township 2
Range 6;
Southwest Quarter (SW¼) of Section 1;
North Half of Northeast Quarter of Southeast Quarte
(N½ of NE¼ of SW¼);
North Half of South Half of North Half of Northea
Quarter of Southwest Quarter (N½ of S½ of N½ o
NE¼ of SW¼) of Section 2, Township 20, Range 10;
North Half of Southeast Quarter (N½ of SE¼);
Southeast Quarter of Southeast Quarter (SE¼ of SE¼
of Section 7, Township 23, Range 8;
[fol. 5] Northwest Quarter of Northeast Quarter (NW¼ o
NE¼) of Section 23, Township 24, Range 8;
Lots 3 and 4 and 5;
Southeast Quarter of Northwest Quarter (SE¼ of NW¼
of Section 6;
North Half of Northeast Quarter of Northwest Quarte
(N½ of NE¼ of NW¼) of Section 17, Township 2
Range 9;
North Half of Northeast Quarter (N½ of NE¼);
North Half of Northwest Quarter (N½ of NW¼) of Se
tion 28;
Northeast Quarter of Southwest Quarter (NE¼ of SW¼
North Half of Southeast Quarter (N½ of SE¼);
Southeast Quarter of Southeast Quarter (SE¼ of SE¼
of Section 21, Township 23, Range 6;
North Half of Northeast Quarter (N½ of NE¼);

Southwest Quarter of Northeast Quarter (SW¼ of NE¼);
Northeast Quarter of Northwest Quarter (NE¼ of NW¼) of Section 16, Township 23, Range 6;
Southeast Quarter (SE¼) of Section 2, Township 24, Range 4;
Lots 6 and 7 and 8, Block 5, Tall Chief Addition to Town of Fairfax, Oklahoma.

IX

That prior to said date, said lands had been in the possession of the administrator of said estate; that subsequent to the issuance of said order, possession of said above-described real estate was turned over to the heirs at law of Mamie Fletcher Pitts, deceased.

X

Plaintiff further alleges that on or about the 11th day of July, 1910, the Secretary of the Interior of the United States issued to the said George Pitts a certificate of competency, authorizing the said George Pitts to sell and convey [fol. 6] any of the lands allotted to him as surplus lands. That said Certificate of Competency remained in full force and effect until the 24th day of June, 1938, when the same was, by order of the Secretary of the Interior of the United States, revoked, and the said George Pitts is now and has been ever since said date, what is commonly known and referred to as a restricted Osage Indian.

XI

Plaintiff further alleges that on the 12th day of July, 1937, the said George Pitts made, executed and delivered to the defendant, Fred G. Drummond, a purported promissory note in writing for the principal sum of $2,500.00 due and payable twelve (12) months after date and to secure the re-payment thereof did make, execute and deliver to the defendant, Fred G. Drummond, a purported real estate mortgage covering all of his undivided interest in and to the lands described in paragraph VIII above. A copy of said mortgage is attached hereto, marked Exhibit "A" and made a part hereof as fully as though set out herein.

XII

Plaintiff further alleges that the said George Pitts failed and refused to pay said mortgage when the same became

due, and thereafter, and on the 24th day of October, 1939, the defendant, Fred G. Drummond, instituted an action in the District Court of Osage County, State of Oklahoma, against the said George Pitts, being numbered 17,234, for a money judgment on said note and to foreclose said mortgage and quiet title to the lands therein described, and for a reformation of said mortgage; that said George Pitts duly and within the time allowed by the statutes of Oklahoma and the court, attempted to defend said suit, alleging that he was without power, right or authority to in any way alienate or encumber the lands inherited by him from his deceased, full blood, restricted Osage Indian wife, and that said mortgage was invalid and did not convey, assign or set over to the plaintiff any right, title, interest, estate or equity in any of the lands described therein, and that said mortgage was, as to said lands, null and void and without any legal force or effect; that said mortgage has never been approved by the Secretary of the Interior.

[fol. 7] Plaintiff further shows that on the 9th day of February, 1941, said District Court of Osage County, in said cause, made and entered its order of judgment finding and determining that the said George Pitts was indebted to the said Fred G. Drummond in the sum of $2,500.00, with interest, costs and attorney fees, and did enter its decree of foreclosure of the mortgage therein referred to and sued upon.

Plaintiff further shows that an appeal was taken from said judgment by the said George Pitts to the Supreme Court of the State of Oklahoma, but that on the 6th day of May, 1941, the said Supreme Court of Oklahoma affirmed the judgment of the District Court of Osage County and did, thereafter and on the 4th day of November, 1941, issue its mandate to the District Court of Osage County, Oklahoma, directing said court to carry out and execute the terms of its decree and judgment.

Plaintiff further shows to the court that thereafter said George Pitts attempted to appeal said case to the Supreme Court of the United States, but that said Supreme Court of the United States, on the 2nd day of March, 1942, denied a petition for a writ of certiorari.

XIII

Plaintiff further shows to the court that there is here involved an interpretation of certain statutes of the United

States relating to Osage Indians. That no question of the proper interpretation of the laws of the State of Oklahoma is involved but purely a question of the correct and proper interpretation of the lands of the United States relating to Osage Indians.

XIV

Plaintiff further alleges that on the 18th day of April, 1912, the President of the United States approved an act of the Congress which provides in Section 7 thereof as follows, to-wit:

"That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to [fol. 8] any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under — of the county court of Osage County, State of Oklahoma: Provided further That nothing herein shall be construed so as to exempt any such property from liability for taxes."

And thereafter, and on February 27, 1925, the President of the United States approved an act of the Congress, Section 3 of which provides as follows, to-wit:

"Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior."

XV

Plaintiff further shows to the court that the Supreme Court of Oklahoma has mis-construed said Acts of Congress in that the Supreme Court of the State of Oklahoma in the case of Pitts v. Drummond, No. 29,859 did declare the law to be as follows, to-wit:

"All restrictions on the alienation of lands inherited by Osage Indians who hold certificates of competency were removed by the provisions of section 6 of the Act of Congress approved April 18, 1912 (37 Stat. 86)."

"That portion of section 7 of the Act of Congress approved April 18, 1912, which provides that no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir to the time which lands and [fol. 9] moneys are turned over to such heirs does not apply to the restricted lands of such deceased allottee and which are not assets in the hands of his administrator for the payment of debts."

"Section 3 of the Act of Congress approved February 27, 1925 (43 Stat. 1008), imposing restrictions on inherited lands of certain Osage Indians does not purport to restrict the alienation of such lands belonging to Osages who hold certificates of competency."

XVI

Plaintiff further shows that acting upon said misconstruction of the law by said Supreme Court, the defendant herein, Fred G. Drummond, has caused a special execution and order of sale to issue out of the office of the Clerk of the District Court of Osage County to sell the lands herein described, and that unless prevented by this court he will, on or about the 4th day of May, 1942, at the hour of two o'clock on said day, at the East front door of the court house in the City of Pawhuska, offer for sale and sell to the highest bidder for cash, the property herein described.

XVII

Plaintiff further alleges that the sale of said property under the facts as aforesaid, would cause this plaintiff irreparable harm and injury in carrying out the policies of the plaintiff in relation to its Indian wards. That it has no ade-

quate remedy at law and that unless the defendant is enjoined and restrained, he will, on or about the 4th day of May, 1942, sell said lands to the irreparable damage of the plaintiff, and the said George Pitts.

XVIII

Plaintiff further alleges that the foreclosure of said mortgage is unlawful and contrary to the letter and spirit of the Acts of Congress above referred to, and that the action of the defendant in attempting to sell said lands is unlawful and illegal and contrary to the laws of the United States that said mortgage made and executed by the said George Pitts is invalid and without any force or effect and did not and does not vest the defendant herein with any [fol. 10] right, title, interest or equity in and to said lands, and that said mortgage should be, by this court, set aside and determined to be a cloud upon the title of the said George Pitts.

Wherefore, plaintiff demands that the court upon a full and complete hearing, find and determine that said George Pitts was without any right, power or authority to mortgage or otherwise alienate or encumber said lands without the consent in writing of the Secretary of the Interior and that this court further find and determine that said aforedescribed mortgage was invalid and that the same conveyed to the defendant, Fred G. Drummond, no right, title, equity or interest in and to the said lands and that title to said lands be quieted in the said George Pitts and that the said Fred G. Drummond be restrained and enjoined from attempting to sell said lands or interfering with the possession of George Pitts in any manner whatsoever and that the plaintiff recover its costs.

Whit Y. Mauzy, United States Attorney, 335 Federal Building, Tulsa, Oklahoma. Attorney for Plaintiff.

[File endorsement omitted.]

EXHIBIT "A" TO COMPLAINT

Real Estate Mortgage

Know All Men by These Presents: That George Pitts, a single person, of Osage County, Oklahoma, party of the first part, has mortgaged and hereby mortgage- to Fred G. Drummond, party of the second part, the following described permises, situated in Osage County, State of Oklahoma, to-wit:

My undivided interest in the following: SW¼ of NE¼, & NW¼ of SE¼, & S½ of SE¼ of Sec. 26, Twp. 28, R. 6; and Lots 3 and 4 & S½ of NW¼ of Sec. 3, Twp. 24, R. 4; and SE¼, less E½ SE¼ SE¼ Sec. 31, Twp. 26, R. 6; and Lots 1 and 2, & S½ of NE¼ Sec. 1, and S½ NW¼ SW¼, & N½ N½ N½ SW¼ SW¼ of Sec. 2, Twp. 20, [fol. 11] R. 10, and NW¼ of Sec. 32, Twp. 29, R. 6; and E½ of NE¼, & SW¼, of NE¼ & SE¼ of NW¼ of Sec. 33 Twp. 25, R. 4; and SE¼ of Sec. 9, Twp. 25, R. 6; and SW¼ of Sec. 1, & N½ NE¼ SW¼, & N½ S½ N½ NE¼ SW¼ Sec. 2, Twp. 20, R. 10; and N½ of SE¼ & SE¼ of SE¼ of Sec. 7 Twp. 23, R. 8; & NW¼ of NE¼ of Sec. 23, Twp. 24, R. 8; and Lots 3 and 4 and 5, & SE¼ of NW¼ of Sec. 6, & N½ NE¼ NW¼ of Sec. 17, Twp. 21, R. 9; and N½ of NE¼, & N½ of NW¼ of Sec. 28, & NE¼ of SW¼, & N½ of SE¼ & SE¼ of SE¼ of Sec. 21, Twp. 23, R. 6; and N½ of NE¼, & SW¼ of NE¼ & NE¼ of NW¼ of Sec. 16, Twp. 23, R. 6; and SE¼ of Sec. 2, Twp. 24, R. 4; and Lots 6 and 7 and 8 in Blk. 5 of Tall Chief Addition to town of Fairfax, Oklahoma,

with all improvements thereon and appurtenances thereunto belonging, and warrant the title to the same.

This mortgage is given to secure the payment of the principal sum of Twenty-five hundred and no/100 dollars, with interest thereon at the rate of 10 per cent per annum, payable annually from mty. according to the terms and at the time and in the manner provided by a certain promissory note of even date herewith, given and signed by the makers hereof, and payable to the order of the mortgagee herein at Hominy Oklahoma.

It Is Expressly agreed and understood by and between the said parties hereto that this mortgage is a first lien

upon said premises; that the party of the first part will pay said principal and interest at times when the same fall due and at the place and in the manner provided in said notes and will pay all taxes and assessments against said land when the same are due each year; and will not commit or permit any waste upon said premises; that building and other improvements thereon shall be kept in good repair and shall not be destroyed or removed without the consent of the second party, and shall be kept insured for the benefit of the second party, and shall be kept insured for the benefit of the second party or its assigns, against loss by fire or lighting for not less than $—— in form and companies satisfactory to said second party, and that all policies and renewals receipts shall be delivered to said second party. If the title to the said premises be transferred, said second party is authorized, as agent of [fol. 12] the first party, to assign the insurance to the grantee of the title.

It is further agreed and understood that the said second party may pay any taxes and assessments levied against said premises or any other sum necessary to protect the rights of such party or assigns, including insurance upon buildings, and recover the same from the first party with ten per cent interest, and that every such payment is secured thereby, and that in case of a foreclosure hereof and as often as any foreclosure suit may be filed, the holder hereof shall recover from the first party an attorney fee of $25.00 and ten per cent upon the amount due, or such different sum as may be provided for by said notes, which shall be due upon the filing of the petition in foreclosure and which is secured hereby, together with expense of examination of title in preparation for foreclosure. Any expense incurred in litigation or otherwise, including attorney fees and abstract of title to said premises incurred by reason of this mortgage or to protect its liens, shall be repaid by the mortgagor to the mortgagee or assigns, with interest thereon at ten per cent per annum, and this mortgage shall stand as security therefor.

And it is further agreed that upon a breach of the warranty herein or upon a failure to pay when due any sum, interest or principal, secured hereby, or any tax or assessment herein mentioned, or to comply with any requirements herein or upon any waste upon said premises, or any removal or destruction of any building or other im-

provements thereon, without the consent of said second party, the whole sum secured hereby shall at once and without notice become due and payable at the option of the holder thereof and shall bear interest thereafter at the rate of ten per cent p-r annum, and the said party of the second part or its assigns shall be entitled to a foreclosure of this mortgage and to have the said premises sold, and the proceeds applied to the payment of the sum secured hereby; and that immediately upon the filing of the petition in foreclosure the holder hereof shall be entitled to the possession of said premises, and to collect and apply the rents thereof, less reasonable expenditures, to the payment of said indebtedness, and for this purpose the holder hereof shall [fol. 13] be entitled to a receiver, to the appointment of which the mortgagors hereby consent, and the holder hereof shall in no case be held to account for any rental or damage other than for rents actually received; and the appraisement of said premises is hereby expressly waived or not at the option of the holder of this mortgage.

In construing this mortgage the words 'first party and second party'' wherever used shall be held to mean the persons named in the preamble as parties hereto.

Dated this 12 day of July, 1937.

George Pitts.

Signed in the presence of —— ——.

E. E. Mtg. Tax $2.50. paid this date 7-14-37, Livingston Hall, County Treasurer.

State of Oklahoma, Osage County, ss. Before me, the undersigned, a Notary Public, in and for said county and state, on this 12 day of July, 1938, personally appeared George Pitts, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth. Witness my hand and official seal the day and year last above written.

Ruth McNulty, Notary Public (Seal). My commission expires Jan. 16, 1940.

Compared, Indexed. 142933. State of Okla. County of Osage, ss. Filed in the office of Register of Deeds for record this 14 day of July, A. D. 1937, at 3:45 o'clock

P.M., and recorded in book 54 of mortgages, on page 628. The within instrument has been compared with the record thereof in this office, and the record there made found correct in every particular, and the same has been properly indexed, in accordance with the laws of Oklahoma. Jeff F. Kendall, Co. Clerk. D. Farris, Deputy.

[fol. 14] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 25, 1942

Comes now Fred G. Drummond and for answer to the complaint of the plaintiff alleges and states:

1. That the complaint of the plaintiff is subject to a motion to dismiss for the reason that the questions raised have already been fully and finally adjudicated but the defendant chooses to answer so as to set out all the facts concerning the previous adjudication and to raise the question of prior adjudication by answer.

2. That the defendant is the owner and holder of the note and mortgage mentioned and described in paragraph No. 11 of the complaint and was such owner and holder from the time of the execution of the same and that they were supported by a good and valuable consideration, and that said note was reduced to judgment and decree of foreclosure of said mortgage entered in the district court of Osage county, Oklahoma, on the 9th day of February, 1940, in a suit wherein this answering defendant was plaintiff and George Pitts was defendant.

3. That George Pitts was and is an allotted member of the Osage Tribe of Indians and that he was granted a certificate of competency by the Secretary of the Interior on the 11th day of July, 1910, a copy of which is hereto attached, marked exhibit A and made a part hereof.

4. That Mamie Fletcher Pitts, Osage Allottee No. 156, wife of George Pitts, died intestate on the 24th day of May, 1937, and that her husband, George Pitts, inherited from her the real estate described in the petition of the plaintiff.

5. That on the 12th day of July, 1937, George Pitts, for a good and valuable consideration, made, executed and de-

livered to this answering defendant the note and mortgage hereinbefore referred to.

6. That on the 24th day of June, 1938, the Secretary of the Interior made and issued an order revoking the certificate of competency which had been issued to the said George Pitts on July 11, 1910.

7. That on the 24th day of October, 1939, the said [fol. 15] George Pitts having defaulted in payment of said indebtedness owing to this answering defendant suit was begun in the district court of Osage county, Oklahoma, against the said George Pitts for recovery of judgment on said note and to foreclose said mortgage, the same being case No. 17,234.

8. That the petition in said suit alleges the making of said note and mortgage and default in payment thereof and asked for judgment and foreclosure.

9. Thereafter and on the 8th day of January, 1940, the said George Pitts, by and through his attorneys, Macdonald, Files & Barney, filed an answer in said cause, a copy of which is hereto attached, marked exhibit B and made a part hereof.

10. That this answering defendant filed a reply to said answer on the 18th day of January, 1940, a copy of which is hereto attached, marked exhibit C and made a part hereof; and that on the 9th day of February, 1940, this answering defendant filed an amendment to his reply, a copy of which is hereto attached, marked exhibit D and made a part hereof.

11. That said cause was tried before the district court of Osage county, Oklahoma, and on the 9th day of February, 1940, judgment was rendered on said note and foreclosing said mortgage, to which the said George Pitts by his attorney excepted.

12. That after the conclusion of the taking of the evidence and the argument in said trial before said district court the court made these oral remarks, which are as follows, to-wit:

"The Court: Well, it is my opinion that George Pitts having a certificate of competency and having had it for a long period of years, and the same never having been

revoked and the restrictions reimposed, that he could encumber or alienate this land. I do not think that Section 2 has reference to an Indian with a certificate of competency, no matter what degree of blood he has. It depends altogether upon what our understanding is of what a certificate of competency means and has meant, ever since [fol. 16] the issuance of certificates of competency. I take it all you want is judgment on this note."

13. That on the 10th day of February, 1940, the said George Pitts filed a motion for new trial in said cause and on the 11th day of March, 1940 the said motion for new trial was overruled and the said George Pitts excepted and gave notice of appeal to the Supreme Court of the State of Oklahoma, and duly perfected said appeal and filed said cause in the Supreme Court, the same being styled there George Pitts, Plaintiff in Error v. Fred G. Drummond, Defendant in Error, being case No. 29,859; and that a copy of the petition in error so filed in the Supreme Court of the state of Oklahoma is hereto attached, marked exhibit E and made a part hereof.

14. That on the 26th day of March, 1940, the said George Pitts made and filed in said case then pending in the district court of Osage County, Oklahoma, a supersedeas bond which was approved by the Acting Superintendent of Osage Agency at Pawhuska, Oklahoma, under authority of and from the Secretary of the Interior to so approve said bond. A copy of said bond with said approval thereto is attached hereto, marked exhibit F and made a part hereof.

15. That after said appeal was lodged in the Supreme Court of the state of Oklahoma the said George Pitts filed a brief and a reply brief therein in each of which he contended that the federal statutes quoted in his answer restricted the mortgaged lands against alienation in the hands of George Pitts and that the mortgage was for that reason invalid, as is shown by a copy of the conclusion to the reply brief of George Pitts which is in words and figures as follows:

"Conclusion. For the reasons herein stated, we are firmly of the opinion that the lands inherited by George Pitts from his full-blood wife, Mamie, were and are restricted in his hands and that those lands may not be taken to pay any obligation contracted by George Pitts; that the

remedy of the defendant in error is to present his clai to the Secretary of the Interior for payment in accordanc with the provisions of Section 4 of the 1925 Act; tha the action of the court in this case in ordering the mor [fol. 17] gage foreclosed was wholly wrong and that th judgment entered in this case should be reversed and th case remanded to the District Court with instructions t dismiss the plaintiff's cause of action and to render judgment quieting the title to this land in the defendan George Pitts."

16. That thereafter and on the 6th day of May, 1941 The Supreme Court rendered its decision which is now re ported in 118 P(2d) 244, a copy of which is hereto attached marked exhibit G and made a part hereof.

17. That shortly thereafter the said George Pitts filed in the Supreme Court of the state of Oklahoma, in said cause a petition for re-hearing, a copy of which is hereto attached, marked exhibit H and made a part hereof, and that along with said petition for re-hearing the said George Pitts filed a brief, the conclusion of said brief being in words and figures as follows, to-wit:

"Conclusion. In conclusion let us summarize the argument made in this brief as follows:

1. The probate courts of Oklahoma have a full and complete jurisdiction over the property of deceased Osage Indians under section 3 of the 1912 Act.

2. Under our probate statutes an administrator is entitled to the possession and control of all real estate, except the homestead, until ordered by the court to turn it over to the heirs.

3. Under section 7 of the 1912 Act lands inherited by an Osage Indian may not be taken or sold to satisfy any indebtedness incurred prior to the time the land is turned over to him.

4. Under section 3 of the 1925 Act restrictions were reimposed on the lands inherited by George Pitts, he being of more than one-half degree of Indian blood.

"For all of these reasons we believe the opinion of this court filed May 6, 1941, is incorrect and that the

Peitition for a Rehearing should be granted and the judgment of the trial court reversed."

18. That on October 10, 1941, said petition for rehear- [fol. 18] ing was overruled by the Supreme Court of the state of Oklahoma.

19. That thereafter the said George Pitts petitioned the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of Oklahoma in said cause, the file number in the Supreme Court of the United States being No. 901, the petition for said writ having been filed therein on January 26, 1942. There is attached hereto a copy of said petition for writ of certiorari, which is marked exhibit I and made a part hereof.

20. That along with said petition for writ of certiorari there was filed a brief in support of the petition. The specifications of error set out in said brief are in words and figures as follows, to-wit:

"1. That said Supreme Court of the State of Oklahoma erred in affirming the decision of the District Court of Osage County, Oklahoma.

"2. That the Supreme Court of the State of Oklahoma erred in holding that all restrictions on the alienation of lands inherited by Osage Indians who hold certificates of competency were removed by the provisions of Section 6 of the Act of Congress approved April 18, 1912 (37 Stat. L. 86).

"3. That the Supreme Court of the State of Oklahoma erred in holding that Section 7 of the Act of Congress approved April 18, 1912, does not apply to the restricted lands of deceased allottees and which are not assets in the hands of his administrators for the payment of debts.

"4. That the Supreme Court of the State of Oklahoma erred in holding that Section 3 of the Act of Congress approved February 27, 1925 (43 Stat. L. 1008), imposing restrictions on inherited lands of said Osage Indians, does not purport to restrict the alienation of such lands belonging to Osage Indians who hold certificates of competency."

21. The conclusion of said brief of George Pitts file support of said petition for writ of certiorari is in w and figures as follows, to-wit:

"Conclusion. A decision on the merits of this case this court is of vital importance, because:

[fol. 19] 1. Two acts of Congress relating to the admi tration of Indian affairs have been held inoperative insc as all Osages similarly situated are concerned.

2. Title to many thousands of acres of land are affec In examining title to similar lands, a lawyer must cho between two conflicting decisions. If he follows Uni States v. Johnson the land is restricted; but if he follo Pitts v. Drummond the land is unrestricted. Thus into able conflict regarding land title will prevail. Because act of Federal Congress is now the subject of a conflict decisions which cannot be harmonized or reconciled, t court should review the act and the conflicting decisions a end the controversy by its authoritative decision.

"It is therefore respectfully submitted that this ca is one calling for the exercise by this Court of its sup visory powers in order that your petitioner may have justi and that a writ of certiorari should be granted, and th Court should review the decision of the Supreme Court the State of Oklahoma and finally reverse the same."

22. On March 2, 1942, the Supreme Court of the Unit States made and entered its order denying the petiti for writ of certiorari as is more fully shown by a co of said order, together with the file marks of the Clerk the Supreme Court of the State of Oklahoma, showing r ceipt and filing of said order by the clerk of the Supren Court of the state of Oklahoma on March 6, 1942, which attached hereto marked exhibit J and made a part here

23. That the Secretary of the Interior had knowled through officials of his office of the pendency of said acti which was begun in the district court of Osage count Oklahoma, and of the steps being taken throughout sai litigation, and that the Secretary of the Interior authorize and approved the employment of Ralph A. Barney to re resent the said George Pitts throughout said litigation, an that the said Ralph A. Barney in pursuance of said emplo ment, represented the said George Pitts throughout sai

litigation, and that the Secretary of the Interior, the Commissioner of Indian Affairs, the Superintendent of the Osage Agency, and the Tribal Attorney of the Osage Tribe of In-
[fol. 20] dians, assisted and cooperated with the said George Pitts and his attorney, Ralph A. Barney, in conducting the defense to said cause of action of this answering defendant and arranged for the payment of said counsel, Ralph A. Barney, for representation of the said George Pitts, from the funds of the said George Pitts which are under the control and supervision of the Secretary of the Interior, and advanced from said funds the necessary costs and expenses of carrying on said litigation.

24. That all questions raised by the complaint of the petitioner herein have been fully and finally adjudicated, and that the plaintiff is estopped from maintaining another suit involving the same cause of action, the same defenses, the same lands, and the same subject-matter, as were involved in the former action.

25. That the said George Pitts having litigated all of those questions in his own proper person they cannot now be litigated again by an agent or trustee for him or in his behalf.

26. That the government does not have capacity to maintain this action for and on behalf of the said George Pitts, he having had a certificate of competency and being an unrestricted Indian at the time the transaction complained of occurred.

27. That the plaintiff is undertaking to maintain this action merely as a representative of the said George Pitts and in his behalf, and in violation of the principles of res adjudicata and estoppel, and that the plaintiff is estopped by the former action from attempting to maintain this one, and that the former action is res adjudicata of all questions raised here.

28. That it has long been the practice of the Secretary of the Interior of the United States of America to approve of the employment of attorneys to represent individual Osage Indians in their litigation, and by section 6 of the Osage Act of February 27, 1925, and by other acts and by general law, such employment is authorized.

29. That in this instance the said Secretary of the Interior did in writing authorize and approve of the employ-
[fol. 21] ment of Ralph A. Barney to represent the said George Pitts throughout the litigation conducted in the State Courts and before the Supreme Court of the United States, and that the said Ralph A. Barney, in pursuance of said employment, and as the attorney approved by the Department of the Interior, did efficiently, diligently and ably represent the said George Pitts throughout said litigation, and the government cannot now maintain another action in behalf of the said George Pitts involving the same identical questions which have been fully litigated and decided.

Further answering to the merits of the complaint of the plaintiff the defendant alleges:

1. That he incorporates hereinto and makes a part hereof all the allegations heretofore made and all the exhibits heretofore attached as a part of this answer.

2. That section 6 of the Osage Act of April 18, 1912, (37 Stat. 86) by specific terms removes the restrictions against alienation from all lands inherited by a member of the Osage Tribe of Indians who has a certificate of competency by this language:

"When the heirs of such deceased allottees have certificates of competency or are not members of the Tribe, the restrictions on alienation are hereby removed",

and *and* that the said George Pitts had a certificate of competency at the time of the death of his wife, Mamie Pitts, and at the time he inherited the real estate involved in this action.

3. That by other Acts of Congress an Osage Indian who has been granted a certificate of competency has full and complete power to alienate all of his real estate with the exception of his allotted homestead.

4. That this defendant denies that the administrator of the estate of Mamie Pitts ever had actual or constructive possession of the real estate involved in this litigation and states that said real estate descended direct from Mamie Pitts to George Pitts and that the same was not subject to be taken to satisfy debts or expenses of administ ation of the said Mamie Pitts and descended direct to G orge

[fol. 22] Pitts and that he was entitled to possession of the same from the time of the death of the said Mamie Pitts.

5. That during the time the said George Pitts had a certificate of competency he was free, able, and competent to transact his own business and to alienate without approval of the Secretary of the Interior any and all of the real estate which he owned or inherited except his own allotted homestead.

6. This answering defendant admits the allegation of paragraph numbered 14 of the complaint.

7. That this defendant did, after his judgment against George Pitts had become final and after the Supreme Court of the United States had refused to review the decision of the Supreme Court of the State of Oklahoma, cause an order of sale to be issued out of the district court of Osage County, Oklahoma, and advertised said mortgaged lands for sale for May 11, 1942, but the plaintiff caused this action to be filed and caused a lis pendens notice to be filed in the office of the County Clerk of Osage County, Oklahoma, giving notice of the pendency of this action and this defendant, therefore, requested the Sheriff of Osage County, Oklahoma, to return said order of sale without holding of said sale and the defendant is now being injured and delayed by the reason of the pendency of this action.

8. That section 4 of the Osage Act of February 27, 1925 (43 Stat. 1008) which authorizes the revocation of a certificate of competency of an Osage Indian by mandatory language requires the payment of the then existing just indebtedness of the member of the Osage Tribe of Indians whose certificate is revoked. This is the language used in section four:

"That all just indebtedness of such member existing at the time his certificate of competency is revoked shall be paid by the Secretary of the Interior, or his authorized representative, out of the income of such member, in addition to the quarterly income hereinbefore provided for; And provided further, That such revocation or cancellation of any certificate of competency shall not affect the legality of any transactions theretofore made by reason of the issuance of any certificate of competency."

[fol. 23] 9. That it was the plain and mandatory duty of the Secretary of the Interior to pay this indebtedness

owing to this defendant rather than to have fostered and assisted in long protracted litigation concerning the validity of said mortgage, and that it is now the plain and mandatory duty of the said Secretary of the Interior to pay said indebtedness rather than to instigate further and additional litigation over questions that have already been fully adjudicated.

Wherefore defendant prays that it be adjudged and decreed that the plaintiff be estopped from maintaining this action, and that the former action be held to be res adjudicata of all the questions herein involved and that the plaintiff be denied any relief whatsoever herein.

Chas. R. Gray, W. M. Palmer, Attorneys for Defendant, Fred G. Drummond, Pawhuska, Oklahoma.

[Duly verified.]

[File endorsement omitted.]

EXHIBIT "A" TO ANSWER

13865

STATE OF OKLAHOMA,
County of Osage, ss:

This instrument was filed for record on the 25 day of July A. D. 1910, at 3.40 o'clock P. M., and duly recorded in Book 1 of Certificate of Competency at page 147.

T. M. Broaddus, Register of Deeds. (Seal.)

Allotment No. 761

Whereas George Pitts a member of the Osage Tribe of Indians, has made application for the issuance of a certificate of competency under the provisions of paragraph 7 of section 2 of the Act of Congress approved June 28, 1906 (34 Stat. L. pp. 539-542); and

Whereas, upon investigation, consideration, and examina-
[fol. 24] tion of the request, George Pitts has been found to be fully competent and capable of transacting his own business and caring for his own individual affairs.

Now, therefore, the First Assistant Secretary of the Interior, by virtue of the power and authority vested in him

by paragraph 7 of Section 2 of said Act of Congress of June 28, 1906, does hereby issue to said George Pitts this certificate of competency and does hereby invest him with full power and authority to sell and convey any or all surplus lands deeded him under the provisions of said Act of Congress, except the minerals therein, which are reserved for the use of the Osage tribe for a period of twenty five years from April 8, 1906, and does hereby declare him to be fully competent and capable of managing and caring for his individual affairs.

Done at the City of Washington this — day of June 11, 1910.

This certificate of competency to become effective 30 days from date hereof and not before.

Frank Pierce, First Assistant Secretary of the Interior. C. F. H. W. C. P.

7-F. J.M.-2.
11223.

EXHIBIT "B" TO ANSWER

IN THE DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA

No. 17234

FRED G. DRUMMOND, Plaintiff,

vs.

GEORGE PITTS and VAN MORGAN, Defendants

ANSWER

Comes now George Pitts and for his separate answer to the petition of the plaintiff herein, alleges and states:

1. That he denies generally and specifically each of the allegations contained in the plaintiff's petition.

2. Further answering the petition of the plaintiff, this defendant alleges and shows to the court that he is a full fol. 25] blood member of the Osage Tribe of Indians and that his name appears at page seventy (70) of the official roll of Osage Indians opposite allotment number 761, and that said roll shows and this defendant alleges the same to be a

fact, that he was born on November 1, 1880, and is a full blood Indian.

3. That by reason of the fact that he is an allotted full blood member of the Osage Tribe of Indians, his property and any property which he might acquire by descent, distribution of devise from another member of the Osage Tribe is subject to such laws as may be enacted by the Congress of the United States and such rules and regulations as may be prescribed by the Secretary of the Interior and the Commissioner of Indian Affairs pursuant to such acts of Congress.

4. This answering defendant further shows that the lands described in the petition of the plaintiff and on which the mortgage referred to in the petition of the plaintiff purports to be a lien, were inherited by this answering defendant from his wife, Mamie Fletcher Pitts.

5. This answering defendant further shows to the court that Mamie Fletcher Pitts was a duly enrolled and allotted member of the Osage Tribe of Indians, the said Mamie Fletcher Pitts being enrolled opposite number 156 and is shown by the official roll of the Osage Tribe to have been born on June 1, 1876, and to have been a full blood member of said tribe.

6. This answering defendant further alleges that all of the lands described in the petition of the plaintiff were lands owned by Mamie Fletcher Pitts at the time of her death and had been acquired by Mamie Fletcher Pitts either by reason of an allotment to her in her own name, or by inheritance from deceased relatives who were themselves members of the Osage Tribe, or by partition among members of the Osage Tribe and thereafter duly approved by the Secretary of the Interior, as required by law.

7. This answering defendant further shows to the court and alleges that at no time during her life did the Secretary of the Interior ever issue to the said Mamie Fletcher Pitts [fol. 26] a certain certificate of competency, authorizing her to sell or convey any of her lands, and this answering defendant alleges that the said Mamie Fletcher Pitts, during her lifetime, could not alienate or encumber any of the lands described in the petition of the plaintiff without the written consent of the Secretary of the Interior.

8. This answering defendant further shows to the court that on the 11th day of July, 1910, the Secretary of the Interior issued to him a certificate of competency and that said certificate of competency remained in full force and effect until the 24th day of June, 1938, when the same was, by order of the Secretary of the Interior, revoked, and the said George Pitts is now what is commonly known and referred to as a restricted Osage Indian.

9. This answering defendant further alleges that on April 18, 1912, the President of the United States approved an act of Congress which provides, in section 7 thereof, as follows, to-wit:

"Sec. 7. That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage Tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject or *or* be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs; Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage county, state of Oklahoma; provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes."

And thereafter, and on February 27, 1925, the President of the United States approved an Act of Congress, section 3 of which provides as follows:

[fol. 27] "Sec. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the

lien of any debt, claim or judgment except taxes, or
subject to alienation without the approval of the Secreta
of the Interior".

10. This answering defendant further shows to the cou
that Mamie Fletcher Pitts, Osage Allottee No. 156, die
intestate on the 24th day of May, 1937, and that her esta
was duly probated in the county court of Osage Count
Oklahoma, in probate case Number 4347. That on the 9
day of September, 1938, the county court made and entere
its order finding and determining the heirs of the sai
Mamie Fletcher Pitts, and did find and determine that th
answering defendant was entitled to the various interes
set forth in paragraph eleven (11) of the plaintiff's pet
tion. This answering defendant further alleges that on th
16th day of February, 1939, the county court entered it
order discharging the administrator theretofore appointe
by said court.

11. This answering defendant says that by reason o
the facts as herein set forth, and by reason of the acts o
Congress above referred to, he was without power, right o
authority to in any way alienate or encumber the land
inherited by him from his deceased, full blood, restricte
Osage Indian wife prior to the date of the decree of th
county court determining heirs and distributing the estat
and that said mortgage referred to and attached to th
plaintiff's petition was and is invalid and did not convey
assign, or set over to the plaintiff any right, title, interest
estate or equity in any of the lands described in the petitio
of the plaintiff, and said mortgage is, as to said lands, nul
and void and without any legal force or effect.

12. Further answering, this defendant says that under th
facts set forth herein and under the statutes above referre
[fol. 28] to, the lands inherited by him from his wife, Mamie
Fletcher Pitts, were and are inalienable without the ap
proval of the Secretary of the Interior, and this defend
ant alleges that said mortgage has never received the ap
proval of the Secretary of the Interior, by reason of which
said mortgage is null and void and did not convey to the
plaintiff any right, title, interest, estate or equity in and to
said lands and said mortgage is, as to said lands, null and
void.

Wherefore, having fully answered the petition of the
plaintiff, this answering defendant prays that the plaintiff

take nothing herein, and that this answering defendant be discharged herefrom with his costs.

Cross Petition

For his cross petition to the petition of the plaintiff, this answering defendant reiterates and repeats as though fully set out herein all of the allegations contained in the answer above, and further alleges that the instrument purporting to be a mortgage on the lands described in the petition of the plaintiff constitutes and is a cloud upon the title to said lands of this answering defendant and that the same is null and void, is without any legal force and effect, and should be removed.

And for his cross petition against the defendant, Van Morgan, this answering defendant reiterates all of the allegations contained in his answer, and further alleges that the judgment in favor of the said Van Morgan dated May 13, 1938, in the sum of $435.00 with interest and costs, is not a lien on the lands described but constitutes a cloud upon the title to said lands and of this answering defendant and cross petitioner, and that the same should be removed.

Wherefore, this answering defendant and cross petitioner prays that the mortgage described in the petition of the plaintiff be, by this court, declared null and void, and prays that this court make and enter its judgment finding, determining and adjudging that said mortgage is null and void, and that same does not constitute a cloud upon the title of this defendant and *corss* petitioner.

[fol. 29] Your petitioner prays further for a judgment of the court that the judgment in favor of the defendant, Van Morgan, be found and determined not to be a lien upon the lands of this cross petitioner and that this court make and enter its order finding, determining and adjudging that the same is not and does not constitute a lien on the lands described herein.

Macdonald, Files & Barney, Attorneys for defendant, George Pitts.

Endorsed: District Court, Osage County, Okla. Filed Jan. 8, 1940. Sam Gilmore, Court Clerk, by Guy Marple, Deputy.

Leave granted to file out of time, this 8th day of January, 1940. Hugh C. Jones, District Judge.

EXHIBIT "C" TO ANSWER

IN THE DISTRICT COURT, OSAGE COUNTY, OKLAHOMA

No. 17,234

FRED G. DRUMMOND, Plaintiff,

vs.

GEORGE PITTS, et al., Defendants

REPLY OF PLAINTIFF TO ANSWER OF DEFENDANT GEORGE PITTS AND ANSWER OF PLAINTIFF TO CROSS PETITION OF DEFENDANT, GEORGE PITTS.

Comes now the plaintiff, Fred G. Drummond and for reply to the answer of the defendant, George Pitts, and for answer to the Cross petition of the defendant, George Pitts alleges and states:

1. That he denies each and every allegation in said answer and cross petition contained except such as are consistent with his petition and with this pleading.

2. Plaintiff admits the allegations of the answer of said defendant contained in paragraphs Nos. 2, 4, 5, 6, 7, 8, 9 and 10.

3. Plaintiff denies all of the statements contained in paragraphs Nos. 11 and 12 whether they be intended for statements of fact or conclusions of law, and alleges that the note and mortgage described in plaintiff's petition are good and valid and did not require the approval of the Secretary [fol. 30] of the Interior, and that by reason thereof the plaintiff acquired a lien on the lands described in his petition, and a right to foreclose the same.

Wherefore, plaintiff prays that the prayer of his petition be granted.

Answer to Cross Petition

For answer to the defendant's cross petition the plaintiff repeats as though fully set out herein all of the allegations contained in the above and foregoing reply.

Wherefore, plaintiff prays that the defendant take nothing and that he have the relief prayed for in his petition.

Gray & Palmer, Attorneys for plaintiff.

Endorsed: District Court, Osage County, Okla. Filed Jan. 18, 1940. Sam Gilmore, Court Clerk, by Guy Marple, Deputy.

EXHIBIT "D" TO ANSWER

No. 17,234

IN THE DISTRICT COURT, OSAGE COUNTY, OKLAHOMA

FRED G. DRUMMOND, Plaintiff,

vs.

GEORGE PITTS, Defendant

AMENDMENT TO REPLY

Comes now the plaintiff and for amendment to his reply states:

1. That section 6 of the Act of Congress of April 18, 1912, relative to the Osages provides that when heirs of deceased Osage allottees have certificates of competency or are not members of the tribe the restrictions against alienations of their lands "are hereby removed".

Wherefore, plaintiff prays that the prayer of his petition be granted.

Gray & Palmer, Attorneys for Plaintiff

Endorsed: District Court, Osage County, Okla. Filed Feb. 9, 1940. Sam Gilmore, Court Clerk, by Guy Marple, Deputy.

[fol. 31] EXHIBIT "E" TO ANSWER

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. —

GEORGE PITTS, Plaintiff in Error,

vs.

FRED G. DRUMMOND, Defendant in Error

PETITION IN ERROR

George Pitts, plaintiff in error, complains of the said defendant in error, Fred G. Drummond, for that the said Fred G. Drummond, at the January, 1940, term of the

District Court of Osage County, state of Oklahoma, recovered a judgment by the consideration of said court against the said George Pitts in a certain action then pending in the said court, wherein the said Fred G. Drummond was plaintiff and the said George Pitts was defendant. The original case made, duly signed, attested and filed, is hereto attached, marked exhibit "A", and made a part of this petition in error; and the said George Pitts avers that there is error in the said record and proceedings in this, to-wit:

1. That the court erred in overruling the motion of the plaintiff in error for a new trial.

2. That the court erred in admitting in evidence the note and mortgage offered by the plaintiff, the defendant in error herein.

3. That the court erred in rendering a judgment in favor of the plaintiff, the defendant in error herein, and against the defendant, the plaintiff in error herein.

4. That the court erred in foreclosing the mortgage involved herein.

5. That the court erred in refusing and declining to sustain the cross petition of the defendant in refusing to quiet the title of this plaintiff in error in and to the lands described in the petition of the plaintiff, and to adjudge and decree that the mortgage described in the petition of the plaintiff was null and void.

Wherefore, plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that judgment may be rendered in favor of the plaintiff [fol. 32] in error and against the defendant in error, and that the plaintiff in error be restored to all rights which he has lost by the rendition of such judgment, and for such other and further relief as to the court may seem just.

George Pitts, Plaintiff in Error, by R. A. Barney, His Attorney.

EXHIBIT "F" TO ANSWER

STATE OF OKLAHOMA,
County of Osage, ss:

IN DISTRICT COURT

No. 17,234

FRED G. DRUMMOND, Plaintiff,

vs.

GEORGE PITTS and VAN MORG: Defendants

SUPERSEDEAS BOND

Know All Men by These Presents, That we, George Pitts as Principal, and National Surety Corporation of N. Y. as sureties are held and firmly bound unto Fred G. Drummond, Plaintiff, in the penal sum of Three thousand and no/100 ($3000.00) dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of *su*, our heirs, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is such that whereas, in the district court of Osage county, in the above entitled cause, on the 9th day of February, 1940, it was ordered, adjudged and decreed by the court that the plaintiff have and recover judgment against the defendant, George Pitts in the sum of $2500.00, with interest, costs and attorney fee, and for foreclosure of a mortgage; and whereas, the above named principal has appealed from said judgment to the Supreme Court of said state, and gives this undertaking in order that execution of said judgment shall be stayed pending the determination of said cause on appeal. Now, therefore, if said above named Principal shall not, during his possession of said property pending a determination of said cause on appeal, commit or suffer to be committed, any waste thereon, and if the judgment be affirmed, shall pay the value of the use and occupation of said property from the date of this undertaking until delivery of possession thereof *prusuant* to such judgment, and shall pay [fol. 33] all costs, and shall pay any deficiency of such judgment remaining after the sale of said property, then this

obligation shall be void, otherwise to remain in full fo
and effect.

In witness whereof, we have hereunto subscribed
names this 25th day of March, 1940.

George Pitts, Principal, National Surety Corporati
of N. Y. By George P. Wingo, Atty. in Fa
Surety. (Seal.)

Approved 3-26-40 Sam Gilmore, Court Clerk by G
Marple, Deputy.

Approved this 9th day of March, 1940.

Wm. Ash Waid, Osage Indian Agency Oil & Gas Inspect
in charge.

* * * * * * *

Endorsed: District Court, Osage county, Okla. Filed M
26, 1940.

Sam Gilmore, Court Clerk, by Guy Marple, Depu

Recorded in Bond Record No. 10, page No. 570.

EXHIBIT "G" TO ANSWER

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 29,859

GEORGE PITTS, Plaintiff in Error,

vs.

FRED G. DRUMMOND, Defendant in Error

SYLLABUS

1. All restrictions on the alienation of lands inherited
Osage Indians who hold certificates of competency were
moved by the provisions of section 6 of the Act of Congre
approved April 18, 1912 (37 Stat. 86).

2. That portion of section 7 of the Act of Congress a
proved April 18, 1912, which provides that no lands
moneys inherited from Osage allottees shall be subject to
be taken or sold to secure the payment of any indebtedne
incurred by such heir prior to the time such lands a

[fol. 34] moneys are turned over to such heirs does not apply to the restricted lands of such deceased allottee and which are not assets in the hands of his administrator for the payment of debts.

3. Section 3 of the Act of Congress approved February 27, 1925, (43 Stat. 1008), imposing restrictions on inherited lands of certain Osage Indians does not purport to restrict the alienation of such lands belonging to Osages who hold certificates of competency.

Appeal From District Court of Osage County.
Hon. Hugh C. Jones, Judge.

Action by Fred G. Drummond against George Pitts. Judgment for plaintiff, and defendant appeals.

Affirmed

R. A. Barney, Pawhuska, for Plaintiff in Error. Charles R. Gray and W. N. Palmer, Pawhuska, for Defendant in Error.

* * * * * * *

Gibson, J.:

This is an action on note and to foreclose mortgage executed by a full blood Osage Indian on his inherited tribal lands. Judgment was for Plaintiff and the defendant mortgagor appeals.

Defendant takes no exception to the judgment so far as the indebtedness is concerned, but alleges that by reason of certain Acts of Congress relating to the property and affairs of the Osages the mortgaged premises were restricted lands and not subject to alienation without the approval of the Secretary of the Interior. Sec. 7, Act of April 18, 1912 (37 Stat. 86); Sec. 3, Act of February 27, 1925, (43 Stat. 1008). The cross petition seeks cancellation of the mortgage.

The lands in question were inherited by defendant from his wife, who was a full blood Osage. They consisted of the wife's individual allotment and allotments of relatives inherited by her.

Plaintiff says there were no restrictions of any kind, or prohibition against the sale or encumbrance of the mort- [fol. 35] gaged premises at the time the mortgage was exe-

cuted. It is asserted that section 6 of the Act of 19
above, removed all restrictions on the alienation of inherit
lands of Osages holding certificates of competency; th
the defendant held such a certificate and was therefo
capable of executing the mortgage without authorization
approval by the Secretary of the Interior.

Said section 6, so far as material herein, provides in su
stance that thereafter the lands of deceased Osage allotte
might be partitioned by agreement of the heirs or by ord
of the proper Oklahoma court, except that the partitio
of the restricted lands of such deceased allottees should
approved by the Secretary of the Interior; and there wa
the further provision, "When the heirs of such decease
allottees have certificates of competency or are not membe
of the tribe, the restrictions on alienation are hereby re
moved."

The defendant held a certificate of competency. He ap
parently came within the latter provision removing restric
tions on alienation.

But defendant says that since the estate of his wife wa
in process of administration in county court, and his in
terest therein had not been delivered or turned over to hin
when he executed the mortgage, the lands were restricted
within the meaning of section 7 of the Act of 1912, and tha
the mortgage was therefore void.

Said section 7 provides that the lands allotted to mem
bers of the Osage Tribe shall not in any manner whatever
be encumbered, taken or sold to secure or satisfy any debt
or obligation contracted or incurred prior to the issuance
of a certificate of competency, nor shall the lands or funds
of such members be subject to any claim against the same
arising prior to grant of certificate of competency. And
it is further provided therein as follows: "That no lands
or moneys inherited from Osage allottees shall be subject to
or taken or sold to secure the payment of any indebted-
ness incurred by such heir prior to the time such lands
and moneys are turned over to such heirs".

Defendant contends that notwithstanding his certificate
of competency the provision quoted above would prohibit
[fol. 36] encumbrance of his inherited land prior to deter-
mination of heirship and decree of distribution in county
court.

In United States v. Mullendore, 30 Fed. Supp. (N. D.
Okla.) 13, the court had under consideration the above

quoted provision of section 7 so far as it pertained to the inherited tribal lands of an heir who was not a member of the tribe. The court held that in the interest of harmonious interpretation of the act it was necessary to hold that said provision applied only to those heirs not designated as unrestricted in section 6. According to that decision the lands descended to heirs holding certificates of competency and to heirs who were not members of the tribe free from all restrictions or further prohibition against alienation.

On further consideration of the provision in section 7 the court said, in substance, that even if such provision did apply to an heir who was not a member of the tribe, and notwithstanding the estate of the deceased was pending administration in county court, the requirements of said provision had been satisfied because in that case the heir was in physical possession of the land when the mortgage was executed.

And in this connection the court further said: "Technical consideration of whether or not DeRoin acquired his title upon the death of the ancestor or upon the date of the decree of distribution or at some intermediate time seems to be beside the point here, althongh it may be noted that the statutes of Oklahoma provide the administrator of an estate takes possession only for the purpose of administration and as soon as it appears that the lands are not necessary for the payment of debts, the lands shall be delivered to the heirs. Sec. 1193, 1218, Okla. Stat. 1931, 58 Okl. St. Ann. secs. 251,291." It is clear from the language of the opinion that the control of the lands by the adminstrator and his formal release thereof or delivery to the heirs was not essential to unrestricted alienation by heirs who were classed as unrestricted by section 6.

Assuming, however, that the provision in section 7 was a restriction or limitation of the right to encumber or alienate, the lands in the instant case were not subject to control of the administrator. They were not assets in his [fol. 37] hands for the payment of the debts of the deceased. The deceased was a full blood Osage Indian who had not received a certificate of competency. Therefore her lands were restricted and free from any of her obligations. Under the various Acts of Congress these lands could not be taken to satisfy the debts of the deceased owner. Act of June 28, 1906, sec. 4, 7 (34 Stat. 539); Act of April 18,

1912, sec. 7 (37 Stat. 86); Act of March 3, 1921 sec. 3 (41 Stat. 1249); Act of February 27, 1925, sec. 3 (43 Stat. 1008); Act of March 2, 1939 (45 Stat. 1480). We have so held with reference to the headright of deceased Osages. Tucker v. Brown, 185 Okla. 234, 90 Pac. (2d) 1071; Brunt v. Labadie, 186 Okla. 700, 100 Pac. (2d) 267. The jurisdiction of the county court extended to the determination of heirship (in re Thompson's Estate, 179 Okla. 240, 65 Pac. (2d) 442), but not beyond that.

It follows that there was no court or officer with power or authority to "turn over" the lands or to deliver them to the heirs. Immediately on the death of the owner they descended to their heirs free from all restrictions *togehter* with the absolute right of immediate possession.

Defendant next contends that the lands in question were restricted or restrictions reimposed thereon, by section 3 of the Act of 1925, supra, and in support cites United States v. Johnson, 29 Fed. Supp. (N. D. Okla.) 300.

Section 3 provides in part as follows:

"Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secetary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior."

This section, says defendant, according to the decision in the Johnson case, above, placed restrictions on inherited lands of two classes of heirs,—first, lands inherited by members of the Osage Tribe of one-half or more Indian blood, and, second, lands inherited by members of the Osage Tribe who do not have certificates of competency. Defendant says he belongs to the first named [fol. 38] class notwithstanding his certificate of competency. In that case we find the following language concerning section 3: "The Act plainly states that it applies to two classes: first, to lands derived to members of the Osage Tribe of one-half (½) or more Indian blood; and, second, to lands devised to members of the Osage Tribe who do not have certificates of competency".

In any event, it is clear that all Indians holding certificates of competency were excluded from the restrictions in section 3. Plaintiff belonged to that class, and his inherited lands were left free of restrictions.

In the Johnson case the court was considering the question of restrictions on the inherited tribal lands of an unenrolled member of the tribe of less than half Indian blood. The court held that the Act of 1929, supra, reimposed restrictions on such Indians, and since the heir in that case had no certificate of competency his inherited lands was restricted by section 3 of the Act of 1925. The case is hardly in point, but it serves as some authority that Osages who have certificates of competency are not affected by section 3, supra.

The judgment is affirmed.

Corn, V. C. J., and Riley, Osborn, Bayless, Hurst and Davison, JJ., concur; Welch, C. J., and Arnold, J., absent.

EXHIBIT "H" TO ANSWER

In the Supreme Court of the State of Oklahoma. George Pitts, Plaintiff in Error, v. Fred G. Drummond, Defendant in Error.

Petition for Rehearing

Comes now George Pitts, plaintiff in error herein, and respectively represents to the court that on the 6th day of May, 1941, a decree and judgment was rendered by this court and in this cause affirming a decree of foreclosure of certain lands involved herein and adjudging that under the applicable acts of Congress relating to Osage Indians there were no restrictions upon the land mortgaged by the plaintiff in error.

[fol. 39] 1. Your petitioner respectfully represents that said decision is in conflict with the statutes of the United States relating to Osage Indians and is in direct contravention thereof.

2. That said decision is in direct conflict with the decisions of the United States courts on the same or similar subjects and unless changed will result in a hopeless conflict of decisions between the two courts on identical or similar questions.

Wherefore, plaintiff in error prays that a rehearing of said cause may be granted by your honorable court and that upon a reconsideration thereof the decision of the District court of Osage County be reversed.

R. A. Barney, Attorney for Plaintiff in error.

EXHIBIT "I" TO ANSWER

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 19

No. —

GEORGE PITTS, Petitioner,

v.

FRED G. DRUMMOND, Respondent

Petition for Writ of Certiorari to the Supreme Court
Oklahoma

To the Honorables, Harlan F. Stone, Chief Justice, and th
Associate Justices of the Supreme Court of the Unite
States:

Your Petitioner, George Pitts, most respectively repre
sents and shows to you as follows:

History of the Case

The respondent, Fred G. Drummond instituted this ac
tion in the District Court of Osage County, Oklahoma, o
October 24, 1939, for a money judgment on a note and t
foreclose a mortgage executed by the petitioner on July 12,
1937. (R. 3-12).

[fol. 40] To this your petitioner answered, alleging that
he was a full-blood member of the Osage Tribe of Indians
and that he was subject to the laws of the United States
of America relating to Osage Indians, and that he and his
property were under the control and supervision of the
Secretary of the Interior of the United States. He further
alleged that he was granted a certificate of competency
by the Secretary of the Interior on July 11, 1910, and that
his certificate of competency was revoked by the Secretary
on June 24, 1938.

As to the lands sought to be foreclosed, your petitioner
alleged that he had inherited all of the lands from his wife,
who was at all times a full-blood, restricted member of
the Osage Tribe of Indians; that she died intestate on the
24th day of May, 1937; that on the 9th day of September,
1938, the County Court of Osage County made and en-
tered its order finding and determining the heirs of Mamie

Fletcher Pitts and setting over to your petitioner his interest in the mortgaged lands.

Your petitioner further alleged that on April 18, 1912, the President of the United States approved an act of Congress relating to the Osage Indians, section 7 of which provides as follows, to-wit (37 Stat. L. 86, 88):

"That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or money inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs; Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage county, state of Oklahoma; Provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes".

[fol. 41] and thereafter, and on February 27, 1925, the President of the United States approved an act of Congress, Section 3 of which provides as follows, to-wit (43 Stat. L. 1008, 1010):

"Land devised to members of the Osage Tribe of one-half or more Indion blood who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior".

Your petitioner further alleged that by reason of the fact that the mortgage executed by him had never re-

ceived the approval of the Secretary of the Interior by reason of the acts of Congress above referred t was without power, right or authority to in any way ate or encumber the lands mortgaged, prior to the of the decree of the county court determining the heir distributing the estate, and further alleged that the gage was invalid and did not convey, assign or set to the plaintiff any right, title, interest, estate or e in any of the lands described in the petition.

Your petitioner therefore prayed that the respo take nothing, and, as his cross petition prayed tha court find and determine that the mortgage was null void, and that it did not constitute a cloud upon the of your petitioner. (R. 15).

To this answer the respondent herein filed a reply mitting all of the facts but denying all of the conclu of law. (R. 20)

The case was tried upon the admission of the note mortgage, over the objections of the respondent an the admissions contained in the plaintiff's reply. court found in favor of the respondent and against petitioner, and rendered judgment against your petiti for the sum of $2500.00 with interest at ten percent July 12, 1938; $275.00 attorney fees and for foreclo of mortgage. (R. 23).

[fol. 42] From this adverse judgment an appeal was t to the Supreme Court of the State of Oklahoma, w court, on the 6th day of May, 1941, handed down its cision affirming the judgment of the trial court and hol that the mortgage was valid. (R. 39). On the 6th da June, 1941, and within the time allowed by law and of said Supreme Court, your petitioner filed his pet for a rehearing of said cause (R. 43) which was, by court, on the 28th day of October, 1941, overruled denied. (R. 44). The mandate was issued by the Supr Court to the District Court of Osage County, (R. 46).

Reasons for Granting Petition for Writ of Certiora

A

This case involves the construction of acts of Cong of the United States relating to Osage Indians. It sents the broad question of whether lands inherited f

a restricted member of the Osage Tribe by a member holding a certificate of competency are subject to alienation by the heir, without the approval of the Secretary of the Interior of the United States, and prior to the time such lands have been "turned over to him" by the state court. The opinion of the Supreme Court of the State has not been published, but it appears on pages 39-43 of the transcript.

B

The decision of the Supreme Court of Oklahoma is directly contrary to and in conflict with a reported decision of the United States District Court for the Northern District of Oklahoma in the case of United States v. Johnson, 29 Fed. Supp. 300, and it therefore presents a conflict of decisions interpreting a federal statute involving Osage Indians.

C

Because of the conflict in the decisions of the United States District Court for the Northern District of Oklahoma and the Supreme Court of the State of Oklahoma, and because of the fact that title to the land is involved, and because the construction of federal statutes is involved, your petitioner respectfully states that this court should accept jurisdiction to review this case in order that a correct and proper decision of the federal statutes involved [fol. 43] may be arrived at, and in order that the confusion concerning the title to lands owned and inherited by members of the Osage Tribe may be avoided and the statutes of such lands finally and authoritatively determined.

D

A certified transcript of the record, certified by the Clerk of the Supreme Court of Oklahoma on the 13 day of December, 1941, (R. 46), is transmitted, and your petitioner, George Pitts, respectfully requests that same be filed as an exhibit to this petition for certiorari.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court to the Supreme Court of Oklahoma, commanding said court to certify to this court a full and complete transcript of the record and of the proceedings in said Supreme Court of Oklahoma

had in the case numbered and entitled on its docket, 29,859, George Pitts, Plaintiff in Error, vs. Fred G. Drummond, Defendant in Error, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States, and that the judgment herein of said Supreme Court of the State of Oklahoma be reversed by this court and for such further relief as this court may deem proper.

Dated at Pawhuska, Osage county, Oklahoma, this day of January, 1942.

Ralph A. Barney, Counsel for Petitioner, Pawhuska, Oklahoma.

EXHIBIT "J" TO ANSWER

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 19

No. 901

GEORGE PITTS, Petitioner,

vs.

FRED G. DRUMMOND

No. 29859

On petition for writ of certiorari to the Supreme Court of the State of Oklahoma.

[fol. 44] On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Oklahoma and of the argument of counsel thereupon had,

It is ordered by this court that the said petition be, and the same is hereby, Denied.

March 2, 1942.

A true copy Charles Elmore Cropley,

Test: Clerk of the Supreme Court of the United States by Hugh W. Barr, Deputy.

Filed in Supreme Court of Oklahoma. Mar. 6, 1942.

Andy Payne, Clerk

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed March 13, 1943

It Is Agreed and Stipulated by and between the plaintiff, United States of America, by its undersigned counsel

Whit Y. Mauzy, the duly appointed, qualified and acting United States Attorney for the Northern District of Oklahoma, and the defendant, Fred G. Drummond, by his undersigned attorneys, Chas. R. Gray and W. N. Palmer, as follows, to-wit:

I

That the allegations contained in the following numbered paragraphs of plaintiff's complaint are true and correct, to-wit: Paragraphs number I, IV, V, VI, VII, VIII, XI, XII and XIV.

II

That on or about the 11th day of July, 1910, the Secretary of the Interior of the United States issued to George Pitts a certificate of competency authorizing the said George Pitts to sell and convey any lands allotted to him as surplus land. That said certificate of competency remained in full force and effect until the 24th day of June, 1938, when the same was by order of the Secretary of the Interior of the United States revoked.

III

That the allegations contained in the following numbered [fol. 45] paragraphs of the first portion of the answer of the defendant, Fred G. Drummond, are true and correct, to-wit: Paragraphs number II, III, IV, V, VI, VII, VIII, IX, X, XI, XIII, XVI, XVIII, XIX and XXII.

IV

That George Pitts entered into a contract with Ralph A. Barney, an attorney engaged in the practice of law at Pawhuska, Osage County, Oklahoma, to represent him in litigation in the State Courts and before the Supreme Court of the United States, which contract of employment was approved by C. L. Ellis, Superintendent of the Osage Indian Agency by virtue of a letter dated December 21, 1938, a copy of which letter is attached hereto and made a part hereof, marked Exhibit "A". That the said Ralph A. Barney, as attorney for George Pitts, did represent said George Pitts in the District Court of Osage County, Oklahoma and, thereafter, in the Supreme Court of the State of Oklahoma and before the Supreme Court of the United States in an attempt to obtain the allowance of a writ of certiorari.

V

George Pitts had a certificate of competency at the tim of the death of his wife, Mamie Pitts.

VI

That either party hereto may offer any such evidence addition to this stipulation as said party may deem comp tent or material.

Witness our hands this 12th day of March, 1943.

Whit Y. Mauzy, United States Attorney, Attorne for Plaintiff. Chas. R. Gray, W. N. Palmer, A torneys for Defendant, Pawhuska, Oklahoma.

[File endorsement omitted.]

[fol. 46] EXHIBIT "A" TO STIPULATION OF FACTS

41990-38
42855-38
GEN

Osage Indian Agenc
Pawhuska, Oklahoma
December 21, 1938.

Messrs. Macdonald, Files and Barney,
Attorneys at Law,
Pawhuska, Oklahoma.

Gentlemen: This will refer to your letter dated Decembe 3, 1938, enclosing the request of George Pitts, restricte Osage allottee No. 761, for the approval of your employ ment to represent him in the matter of certain disputed claims filed against him for payment as a result of the revocation of his certificate of competency, and to your letter dated December 15, 1938, stating that your fee wil not exceed $500.00.

In compliance with the allottee's request, your employ ment in the above matter is hereby authorized with fee t be determined by the Secretary of the Interior on a quan tum meruit basis at the conclusion of the services, payment to be made from such funds as are available at the termina tion thereof.

Very truly yours, C. L. Ellis, Superintendent

cc—Commissioner of Indian Affairs,
Washington, D. C.
Mr. George Pitts,
Pawhuska, Oklahoma.

In United States District Court

REQUEST FOR ADMISSIONS UNDER RULE 36 OF FEDERAL RULES OF CIVIL PROCEDURE—Filed April 2, 1943

That the defendant, Fred G. Drummond, requests the plaintiff, The United States of America, to make the following admissions for the purpose of this action only, subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the allegations contained in the following num- [fol. 47] bered paragraphs of the first portion of the answer of the defendant Fred G. Drummond, are true and correct, to-wit: Paragraphs number XII, XIV, XV, XVII, XX and XXI.

2. That the letters of December 21, 1938, from C. L. Ellis, Superintendent, to Messrs. Madconald, Files & Barney was written by said Superintendent in pursuance of special or general authority from the Secretary of the Interior of the United States of America.

3. That on or about the 2nd day of November, 1939, and after the foreclosure suit had been filed in the district court os Osage County, Oklahoma, by Fred G. Drummond against George Pitts, George Pitts wrote a letter to the Superintendent of the Osage Agency stating in substance that he had employed Ralph A. Barney to represent him in the Drummond v. Pitts litigation and asked for approval of his employment, and that upon receipt of this letter Mr. Ellis, the Superintendent, wrote a letter to the Commissioner of Indian Affairs, concerning it, and that Ralph A. Barney received another letter from the Superintendent of Osage Agency dated on or about November 18, 1939, in which reference is made to the former letter of December 21, 1938, to Messrs. Macdonald, *Filed* & Barney, approving of the employment of Mr. Barney to represent Mr. Pitts generally concerning claims against him, and that it was further stated in substance in said letter of November 18, 1939, that the Commissioner of Indian Affairs considered his previous letter of December 21, 1938, sufficient authority for Mr. Barney to represent Mr. Pitts in the Drummond litigation in the State Court.

4. That in pursuance of a request from Mr. Ralph A. Barney, attorney for George Pitts, made on or about Feb-

ruary 9, 1940, the Secretary of the Interior authori
said Ralph A. Barney to appeal from the decision
trial court to the Supreme Court of the state of Oklah

5. That in pursuance of request from Mr. Ralph A
ney, made on November 7, 1941, the Secretary
Interior, on December 9, 1941, authorized the said Ra
Barney to make application to the Supreme Court
United States for a Writ of Certiorari to the Su
[fol. 48] Court of the State of Oklahoma for the purp
undertaking to secure a review of the decision *rence*
the Supreme Court of the State of Oklahoma affirmi
judgment of the district court of Osage county, Okl

6. That the Secretary of the Interior of the United
of America had knowledge through the officials of hi
of the pendency of said action which was begun
district court of Osage county, Oklahoma, by Fr
Drummond against George Pitts, and of the steps
taken throughout said litigation, and that the Secret
the Interior authorized and approved the employm
Ralph A. Barney to represent the said George Pitts th
out said litigation, and that the said Ralph A. Bar
pursuance of said employment, represented the said
Pitts throughout said litigation, and that the Secret
the Interior, the Commissioner of Indian Affairs, a
Superintendent of the Osage Agency, and the Tribal
ney of the Osage Tribe of Indians, assisted and co
ated with said George Pitts and his attorney, Ralph A
ney, in conducting the defense to said cause of
of this defendant Fred G. Drummond, and arrange
the payment of said counsel, Ralph A. Barney, for
sentation of the said George Pitts, from the funds of th
George Pitts which are under the control and super
of the Secretary of the Interior, and advanced from
funds the necessary costs and expenses of carrying o
litigation.

7. That it has long been the practice of the Secreta
the Interior of the United States of America to appro
the employment of attorneys to represent individual
Indians in their litigation, and by Section 6 of the
Act of February 27, 1925, and by other acts and by ge
laws such employment is authorized.

8. That the Secretary of the Interior did in writing authorize and approve of the employment of Ralph A. Barney to represent the said George Pitts throughout the litigation between Fred G. Drummond and George Pitts conducted in the State Courts and before the Supreme Court of the United States, and that the said Ralph A. Barney, in pursuance of said employment, and as the attorney approved by the Department of the Interior, did efficiently, [fol. 49] diligently and ably represent the said George Pitts throughout said litigation.

Chas. A. Gray, W. N. Palmer, Attorneys for the Defendant, Pawhuska, Oklahoma.

Service and receipt of copy of the above and foregoing Request for Admissions is hereby acknowledged this 2nd day of April, 1943.

Whit Y. Mauzy, United States District Attorney, Northern District of Oklahoma, Attorney for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER TO DEFENDANT'S REQUEST FOR ADMISSIONS—Filed May 10, 1943

The United States of America makes the following statement in response to the defendant's request for admissions served upon the United States on the 2nd day of April, 1943.

I

A. We have been unable to obtain a copy of the record, therefore, are unable to determine whether the quotation contained in Paragraph XII of the Answer is true or correct and no one authorized to appear for the United States was present at the trial of said cause and the United States Attorney has been unable to determine whether said quotation is correct. Even if it is correct, it is immaterial and *irrelevent* to the issues in the case at bar.

b. The supersedeas bond mentioned in Paragraph XIV of defendant's answer was approved by Wm. Ash Wade,

Osage Indian Agency, Oil and Gas Inspector in Charge, who was at said time acting as Acting Superintendent of the Osage Indian Agency. Mr. Wade's approval of the appeal and supersedeas bond was authorized by Honorable W. C. Mendenhall, Acting Assistant Secretary of the Interior.

c. As to Paragraph XV of the defendant's answer, the facts stated in said paragraph are true, but the facts con-
[fol. 50] tained therein are immaterial and irrelevant to the issues presented in the case at bar.

d. As to Paragraph XVII of the defendant's answer, the facts stated in said paragraph are true, but the facts contained therein are immaterial and irrelevant to the issues presented in the case at bar.

e. As to Paragraph XX of the defendant's answer, the facts stated in said paragraph are true, but the facts contained therein are immaterial and irrelevant to the issues presented in the case at bar.

f. As to Paragraph XXI of the defendant's answer, the facts stated in said paragraph are true, but the facts contained therein are immaterial and irrelevant to the issues presented in the case at bar.

II

The United States is unable to admit Paragraph II of defendant's request because the same is not one of fact, but a conclusion of law. The letter of December 21, 1938 from C. L. Ellis, Superintendent, to Messrs. Macdonald, Files and Barney may have been written by the Superintendent in pursuance to a letter dated March 2, 1928 from the Commissioner of Indian Affairs to J. Geo. Wright, Superintendent of the Osage Indian Agency, which is as follows, to-wit:

"United States Department of the Interior, Office of Indian Affairs, Washington

March 2, 1928
D-929-28.

Mr. J. George Wright, Superintendent,
Osage Indian Agency.

DEAR MR. WRIGHT:

Receipt is acknowledged of your letter of February 18, regarding the payment of attorneys' fees in cases involving restricted Indians.

In the future in cases where the employment of an attorney is considered proper and necessary and the fees requested will not be in excess of $500, you are authorized to inform such attorney that their employment will be approved with the understanding that the fee will be deter- [fol. 51] mined by the Department on a quantum meruit basis after the services have been performed. In other cases where a larger fee may be anticipated it is believed advisable to have the contract submitted to the Department for consideration.

Sincerely yours, Chas. H. Burke, Commissioner.

Approved: March 5, 1928.

John H. Edwards, Assistant Secretary."

III

We are unable to admit or deny that on or about the 2nd day of November, 1939 George Pitts wrote a letter to the Superintendent of the Osage Indian Agency relating to the fact that he had employed R. A. Barney to represent him in the Drummond vs. Pitts litigation. It appears that Messrs. Macdonald, Files and Barney wrote a letter to C. L. Ellis, Superintendent of the Osage Indian Agency, dated November 2, 1939 and enclosed therewith was a request of George Pitts for the approval of the employment of Messrs. Macdonald, Files and Barney as his attorneys to appear for him in connection with a suit filed by Fred G. Drummond. On the 18th day of November, 1939, C. L. Ellis, Superintendent of the Osage Indian Agency, answered said letter of November 2, 1939 and a copy of said Superintendent's letter is attached hereto and marked Exhibit "A".

IV

That on or about the 2nd day of March, 1940, W. C. Mendenhall, Acting Assistant Secretary of the Interior, upon the recommendation of C. L. Ellis, Superintendent of the Osage Indian Agency, approved appeal and supersedeas bond and granted authority for expenses not to exceed five

hundred dollars ($500.00) and, thereafter, on the 16th day of March, 1940, Wm. Ash Wade, Oil and Gas Inspector in Charge, Osage Indian Agency, advised R. A. Barney by letter that, "An appeal to the Supreme Court of the State of Oklahoma in the above mentioned case," (Fred G. Drum-
[fol. 52] mond v. George Pitts, No. 17234 in the District Court of Osage County) "was approved by the Department on March 2, 1940. Authority was also granted under said date for the approval of the supersedeas bond in this case."

V

That on the 6th day of December, 1941, W. C. Mendenhall, Acting Assistant Secretary of the Interior, sent a telegram to T. B. Hall, Superintendent of the Osage Indian Agency, which read as follows: "Relet George Pitts appeal and expenses approved as recommended." On the 9th day of December, 1941, T. B. Hall, Superintendent of the Osage Indian Agency, wrote a letter to Mr. R. A. Barney, concerning the writ of certiorari from the Supreme Court of the United States. A copy of said letter is attached hereto and marked Exhibit "B".

VI

The United States states that it cannot truthfully either admit or deny the matters set forth in Paragraph VI of defendant's request for the reason that this is a catch-all statement in which statements of fact and conclusions of law are inextricably mixed.

VII

The United States neither admits nor denies the facts contained in Paragraph VII of defendant's request for admissions for the reason that said request does not pertain to a relevant and material fact and the latter part of said request is obviously a request for a conclusion of law rather than an admission of fact.

VIII

The United States denies the statements contained in Paragraph VIII of defendant's request for admissions, except as to the employment of Ralph A. Barney as may be stated in other parts of this instrument and the United States declines an answer to the latter part of Paragraph

[fol. 53] VIII of said defendant's request for the reason that said request is a request for an opinion and not of material fact.

United States of America, by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma.

[Duly verified.]

[File endorsement omitted.]

EXHIBIT "A" TO ANSWER

41990-38
42855-38
38598-39
GEN:pl

Osage Indian Agency,
Pawhuska, Oklahoma,
November 18, 1939.

Messrs. Macdonald, Files and Barney, Attorneys at Law, Pawhuska, Oklahoma.

GENTLEMEN:

This will acknowledge receipt of your letter dated November 2, 1939, enclosing the request of George Pitts, restricted Osage allottee No. 761, for the approval of your employment to represent him in connection with the suit filed by Fred G. Drummond, against him to foreclose a mortgage and for personal judgment in the sum of $2500.00.

The records of this office show that under date of December 31, 1938, you were authorized to represent George Pitts in the matter of certain disputed claims filed against him for payment as a result of the revocation of his certificate of competency, and it is believed that said authorization is sufficient to cover the suit referred to above.

Very truly yours, C. L. Ellis, Superintendent.

cc: Commissioner of Indian Affairs, Washington, D. C.
Mr. George Pitts, Pawhuska, Oklahoma.

[fol. 54] EXHIBIT "B" TO ANSWER

60642

Osage, Indian Agency,
Pawhuska, Oklahoma,
December 9, 1941.

Mr. R. A. Barney, Attorney at Law, Pawhuska, Oklahoma.

DEAR MR. BARNEY:

Reference is made to your letter of November 7, 1941 regarding the case of Drummond vs. Pitts, No. 17234, District Court of Osage County, Oklahoma, advising that you believe the case should be appealed to the Supreme Court of the United States and asking that $400 of the funds of George Pitts, restricted Osage allottee No. 761, be made available for the expense.

The matter has been submitted to the Department and I am now in receipt of a telegram from the Acting Assistant Secretary of the Interior advising that the appeal and expenses in the above case are approved.

Sincerely yours, T. B. Hall, Superintendent.

Copy: Mr. George Pitts, Pawhuska, Oklahoma.

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed September 4, 1943

FINDINGS OF FACT

The court finds:

I

That Mamie Fletcher Pitts was a full blood member of the Osage Tribe of Indians, enrolled opposite No. 156; that she was never issued a certificate of competency; that she died intestate on May 24, 1937, seized and possessed of the real estate involved in this action, which had been allotted to her as a member of the Osage Tribe.

II

That the United States maintains this action in its own behalf and on behalf of George Pitts, a full blood member

of the Osage Tribe of Indians, enrolled opposite No. 761. [fol. 55] That the defendant, Fred G. Drummond, is a resident of Osage County, Oklahoma.

III

That George Pitts was the surviving husband of Mamie Fletcher Pitts; that proceedings were duly instituted in the County Court of Osage County to administer the estate of Mamie Fletcher Pitts, deceased, and George Pitts was appointed, qualified and acted as administrator of such estate; that on September 9, 1938, the County Court entered an order adjudging George Pitts to be the sole heir of Mamie Fletcher Pitts and entered an order directing the distribution of the estate to him as such heir; that on February 16, 1939, the administrator was discharged by order of the County Court.

IV

That on July 11, 1910, the Secretary of the Interior issued to George Pitts a certificate of competency which remained in full force and effect until June 24, 1938, when such certificate was revoked by the Secretary of the Interior.

V

That George Pitts, as administrator of the estate of Mamie Fletcher Pitts, deceased, executed agricultural leases on land involved in this action, which were approved by the County Court of Osage County; that such leases were prepared on departmental forms and submitted to the Administrator by the Osage Indian Agency, and during the course of the administration of the estate the Osage Agency looked after the leasing of the lands and collected the rentals thereon; that George Pitts executed the leases covering the land when requested by depa. ent officials to do so, but did not receive payment of any re als as administrator; that the value of the land involved n this action and the rental collected by the Osage Indian Age. y thereon were not included in computing his fee for service as administrator of the state.

VI

That it has been the *practise* of the Superintendent of the Osage Indian Agency since the effective date of the Act of

[fol. 56] Congress of July 8, 1940, to execute agricultural leases on behalf of the heirs of deceased Osage Indians.

VII

That on July 12, 1937, George Pitts executed a mortgage to the defendant Fred G. Drummond covering the land involved in this action as security for the payment of indebtedness in the sume of $2,500; that such mortgage was not approved by the Secretary of the Interior.

VIII

That on October 24, 1939, Fred G. Drummond instituted an action in the District Court of Osage County, Oklahoma, against George Pitts to recover judgment for the amount of such indebtedness and for a foreclosure of the mortgage lien; that on February 9, 1940, a judgment was entered by the District Court of Osage County in favor of Fred G. Drummond against George Pitts for the amount of such indebtedness and decreeing foreclosure of the mortgage covering the land involved in this action; that on appeal such judgment was affirmed by the Supreme Court of Oklahoma on May 6, 1941, (Pitts vs. Drummond, 189 Okla. 574, 118 P. (2) 244); that writ of certiorari was denied by the Supreme Court of the United States on March 2, 1942, (315 U. S. 814).

IX

That George Pitts was represented in such litigation by Ralph A. Barney, a member of the firm of McDonald, Files & Barney, Pawhuska, Oklahoma; that the employment of Mr. Barney was approved by the Secretary of the Interior; that the Secretary of the Interior authorized the appeal by George Pitts from the District Court of Osage County to the Supreme Court of Oklahoma and approved the supersedeas bond executed in connection with such appeal; that the Secretary of the Interior authorized and approved the application to the Supreme Court of the United States for a writ of certiorari; that the Secretary of the Interior authorized and approved payment of expenses, including attorney's fee, in connection with the litigation, and such expenses were paid from the funds of George Pitts held by the Osage Indian Agency; that the United States was not [fol. 57] a party to such litigation and counsel for George

Pitts was not authorized to appear for or represent the United States.

X

That the same questions of fact and law now presented to the court in this action by the United States were presented to the District Court of Osage County, Oklahoma, and to the Supreme Court of Oklahoma in the case of Pitts vs. Drummond, supra, by George Pitts, the defendant in that case. Questions of law raised therein by George Pitts and presented herein by the United States were decided adversely to George Pitts.

CONCLUSIONS OF LAW

I

The United States was not a party to the case of Pitts v. Drummond, supra, and is not bound by the judgment entered in that cause and is not barred by the doctrine of res judicata from maintaining this action. Bowlind v. United States, 223 U. S. 528; Logan v. United States, 10 Cir., 58 F. (2) 697.

II

At the time of the death of Mamie Fletcher Pitts, George Pitts held a certificate of competency and, by reason of Section 6 of the Act of April 18, 1912 (37 Stat. 86), the land involved in this action descended to him free of any restrictions against alienation. George Pitts was entitled to possession of such land immediately after the death of Mamie Fletcher Pitts. Since Mamie Fletcher Pitts was a full blood member of the Osage Tribe of Indians, the land was not subject to payment of any debts of her estate and the administrator of her estate was not entitled to possession thereof. As a general rule, land exempt from the payment of debts of deceased is not subject to administration in the probate courts of Oklahoma. It has been so held with respect to homesteads and with respect to restricted lands of the members of the Five Civilized Tribes of Indians. Barnard v. Bilby, 68 Okla. 63, 171 P. 444; Cowokochee v. Chapman, 90 Okla. 121, 215 F. 759; Swain v. Hildebrand, 169 Okla. 327, 36 P. (2) 942. But it is argued that a differ-
[fol. 58] ent rule obtains with respect to Osage Indians; that Section 3 of the Act of April 18, 1912, provides that the property of deceased allottees of the Osage Tribe shall be

subject in probate matters to the jurisdiction of the count courts of Oklahoma; that the statute should be construe as giving the county courts in probate matters jurisdictio of all property of deceased allottees of the Osage Trib including restricted lands, and Globe Indemnity Compan v. Bruce, 10 Cir., 81 F. (2) 143, is cited as authority. I that case, the deceased allottee was of less than one-hal degree Indian blood and possessed a certificate of com petency. Section 2 of the Act of February 27, 1925 (4 Stat. 1008) and Section 4 of the Act of March 2, 1929 (4 Stat. 1478) clearly disclose that it was not intended by Con gress that the restricted lands of Osage Indians of one-hal or more Indian blood, not having a certificate of compe tency, should be subject to administration in the probat courts of Oklahoma, or that the administrator of the estate of such Indians would be entitled to possession of such restricted lands. It follows that even if Section 7 of the Ac of April 18, 1912 imposes limited restrictions upon land inherited by members of the Osage Tribe having a certifi cate of competency until such lands are turned over to such heirs, the statute has no application here for the reason tha the lands were never in the possession of the administrato and could not have been "turned over" by George Pitts the administrator, to George Pitts, the heir. It has been held that Section 7 does not apply to heirs of such deceased allottees who have certificates of competency or are no members of the tribe, but I find it difficult to follow the reasoning of those cases. United States v. Mullendore D. Ct. N. Dist. of Okla., 30 F. Sup. 13; Pitts v. Drummond 189 Okla. 574, 118 P. (2) 244.

III

It is further argued by the United States that Section 3 of the Act of February 27, 1925, imposed restrictions on the lands involved in this action. It is *suffested* that Section 3 should be interpreted as imposing restrictions upon all lands devised to and inherited by members of the Osage Tribe of more than one-half degree of blood having certificates of competency. The language used in Section 3 is not clear and free from ambiguity. A consideration of all of the legislation pertaining to the Osage Tribes of Indians [fol. 59] and consideration of the report to Congress of the Committee on Indian Affairs under date of March 5, 1924,

negatives any intent upon the part of Congress to impose restrictions on lands inherited by members of the Tribe having certificates of competency.

IV

The lands here under consideration were free from restrictions at the time the mortgage was executed by George Pitts to Fred G. Drummond, and the defendant Drummond acquired a valid lien against such land.

V

Judgment should be entered in this cause for the defendant.

Dated August 31, 1943.

Royce H. Savage, United States District Judge.

[File endorsement omitted.]

In United States District Court

Judgment—Filed Sept. 4, 1943

This matter coming on for hearing this 4th day of September, and the plaintiff appearing by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma, and the defendant appearing by his attorney Chas. R. Gray, and the Court being fully advised in the premises, and after having considered the evidence and the briefs filed by the parties to this action, finds the issues in favor of the defendant, as more particularly set out in the Findings of Fact and Conclusions of Law filed herein.

It Is Therefore Ordered, Adjudged, and Decreed, that plaintiff take nothing and that the defendant be discharged.

And It Is So Ordered.

Royce H. Savage, Judge.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Nov. 1, 1943

Notice Is Hereby Given that the United States of America, plaintiff herein, hereby appeals this case to the Circuit Court of Appeals for the Tenth Circuit from the judgment entered in this cause on the 4th day of September, 1943.

Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma, Attorney for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME—Filed Nov. 6, 1943

Now, on this 6th day of November, 1943, this matter coming on before the court on the application of the United States of America for additional time for the filing of the record in the Circuit Court of Appeals in the above-entitled case and it appearing to the court, for good cause shown, that said time should be granted.

It Is Therefore the Order of the Court that the United States of America be and it hereby is granted ninety (90) days additional time from November 1st, 1943, in which to file the record in the Circuit Court of Appeals in this cause of action.

And It Is So Ordered.

Royce H. Savage, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

STATEMENT OF POINTS ON APPEAL—Filed Jan. 3, 1944

Comes now the United States of America, appellant in the above-entitled case and specifies the following statement of points to be relied upon on appeal.

[fol. 61] 1. The District Court erred in concluding as a matter of law that the real estate involved in this action

at the time of the death of Mamie Fletcher Pitts descended to George Pitts free from any restrictions against alienation, pursuant to the Act of Congress of April 18, 1912 (37 Stat. 86).

2. The District Court erred in not holding that a mortgage given by a full-blood Osage Indian with a certificate of competency covering lands inherited from a full-blood Osage Indian without a certificate of competency after the decedent's death but before a final order of distribution and probate proceedings, is invalid under Section 7 of the Act of Congress of April 18, 1912 (37 Stat. 86).

3. The trial court erred in concluding as a matter of law that the real estate involved in this action was not restricted against alienation or encumbrance by virtue of the Act of Congress of February 27, 1925 (43 Stat. 1008).

4. The District Court erred in not holding that where real estate is inherited by a full-blood Osage Indian with a certificate of competency, the real estate is restricted against alienation or encumbrance by virtue of Section 3, of the Act of Congress of February 27, 1925 (43 Stat. 1008, 1010).

5. The District Court erred in concluding as a matter of law that the real estate involved in this action was free from restrictions at the time the nortgage was executed by George Pitts to Fred G. Drummond and that said mortgagee acquired a valid lien against the real estate.

Respectfully submitted,
Norman M. Littell, Assistant Attorney General. Whit Y. Mauzy, United States Attorney.

I hereby certify that I have on this 3rd day of January, 1944, mailed a copy of the above statement of points on [fol. 62] appeal to the attorney for the defendant, Mr. Charles Gray, Pawhuska, Oklahoma.

Jo Neal.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DESIGNATION OF THE CONTENTS OF THE RECORD ON APPEAL—
Filed Jan. 3, 1944

Comes now the United States of America, appellant in the above-entitled cause and designates the following to be contained in the record on appeal:

1. Complaint of the United States filed April 29, 1942.

2. Defendant's Answer filed May 25, 1942.

3. Answer of the United States to defendant's request for admissions filed May 10, 1943.

4. Stipulation of facts, filed March 13, 1943.

5. Transcript of evidence of George Pitts, including inventory filed by him as administrator.

6. Findings of fact and conclusions of law of the Court filed September 4, 1943.

7. Journal Entry of judgment filed September 4, 1943.

8. Notice of appeal filed November 1, 1943.

9. Order extending time to file record in Circuit Court of Appeals filed November 6, 1943.

10. Certified list of docket entries.

11. Statement of points on which appellant relies.

12. This designation of the contents of the record on appeal.

Respectfully submitted,
Norman M. Littell, Assistant Attorney General. Whit Y. Mauzy, United States Attorney.

I certify that I have this day mailed a copy of the above [fol. 63] designation to Charlie Gray, Pawhuska, Oklahoma, Attorney for defendant. This 3rd day of January, 1944.

Jo Neal.

[File endorsement omitted.]

In United States District Court

Designation of Additional Contents of Record on Appeal, by Fred G. Drummond—Filed January 6, 1944

Comes now the defendant, Fred G. Drummond, the appellee in the above entitled cause, and designated the following to be contained in the record on appeal in addition to the parts of the record designated by the United States of America, the appellant:

1. Request of the defendant for admissions of the plaintiff under Rule 36 of the Federal Rules of Procedure filed on or about April 2, 1943.

2. Transcript of the evidence of Fred G. Drummond, including the offer of proof.

3. Transcript of the evidence of G. C. Thompson.

4. Transcript of oral stipulations entered into during the course of the trial.

5. Exhibits from the County Court of Osage County, Oklahoma, in the matter of the Administration of the estate of Mamie Fletcher Pitts, County Court Probate No. 4347, and stipulations, if any, concerning such exhibits.

6. Transcript of exhibits from case No. 17,234 in the District Court of Osage County, Oklahoma, wherein Fred G. Drummond was the plaintiff and George Pitts was the defendant, and transcript of oral stipulations concerning such exhibits, if any.

7. This designation of additional contents of the record on appeal by the defendant, Fred G. Drummond.

These additional parts of the record are believed necessary in order to enable the appellee to present to the appellate court the points in opposition to those on which appellant relies, and the further points raised by the ap-
[fol. 64] pellee to the effect that the State Court final adjudication is binding upon the United States and that the United States cannot maintain this action.

Respectfully submitted, Chas. R. Gray, W. N. Palmer, Attorneys for Appellee, Fred G. Durmmond.

Service and receipt of copy of the foregoing Designation acknowledged this 6th day of January, 1944.

Whit Y. Mauzy, United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

CLERK'S DOCKET ENTRIES

Apr. 29, 1942 File Complaint.
File praecipe for summons—Issued.

May 18, 1942 File Summons—returned served Fred G. Drummond personally at Hominy, Oklahoma, May 14, 1942.

May 25, 1942 File Answer of Defendant.

Aug. 14, 1942 Enter order cause set for Pre-trial Sep. 1, 1942.

Sept. 1, 1942. Enter hearing on pre-trial conference—parties present by counsel—statements made—stipulations of facts to be filed—Briefs to be filed. (RHS-J)

Mar. 13, 1943 File Stipulation.

Apr. 2, 1943 File Defendants request for admissions under Rule 36 of Federal Rules.
File Brief of Defendant.

Apr. 28, 1943 File & Enter Order granting pltf. an extension to May 8, 1943 in which to answer defendant's request for admissions. (RHS-J.)

[fol. 65]

May 8, 1943 Enter order granting pltf. an extension to May 10, 1943 in which to answer defendant's request for admissions. (RHS-J)

May 10, 1943 File answer of U. S. to Defendant's Request for Admissions.

June 1, 1943 Enter order cause set for trial at Tulsa, June 15, 1943. (RHS-J)

June 10, 1943 File praecipe for *subponea* on behalf of U. S. Geo. Pitts & G. B. Fulton—issued.

June 10, 1943 File application for *subponea* duces tecum.

June 14, 1943 File U. S. sub. returned—Served G. B. Fulton & George Pitts at Pawhuska on 6-11 & 13 1943.

June 15, 1943 Case called for trial—Parties present by counsel—announce ready—Witnesses sworn—Plaintiff's witnesses—Plaintiff Rests—Original Exhibits to be withdrawn and copies submitted—Defendant's witnesses—Defendant rests—Both sides rest—Plaintiff's witness G. C. Thompson recalled—Both

		sides rest—Arguments made—Decision taken under advisement — Defendant to file Reply Brief within 10 days. (RHS-J)
June	23, 1943	File brief of plaintiff. File brief for U. S. File reply brief of deft.
July	2, 1943	File Plaintiff's suggested Findings of Fact & Conclusions of Law.
Aug.	26, 1943	File supplemental brief of defendant.
Aug.	30, 1943	File requested Findings of Fact & Conclusions of Law by Deft.
Sept.	4, 1943	File Findings of Fact and Conclusions of Law. File & Enter J. E. that pltf. take nothing and that defendant be *discharges*. (RHS-J)

[fol. 66]

Nov.	1, 1943	File Notice of Appeal (copy mailed to Gray & Palmer, Pawhuska, Okla.)
Nov.	6, 1943	File & Enter order extending time 90 days from 11-1-43 to docket appeal in CCA (RHS-J)
Dec.	16, 1943	File praecipe for certified copy of all Docket Entries—Issued—.
Jan.	3, 1944	File designation of the contents of record on appeal.
Jan.	3, 1944	File Statement of Points on Appeal.
Jan.	4, 1944	File Transcript of Testimony of George Pitts and portion of plts's exhibit No. 16.
Jan.	6, 1944	File designation of additional contents of record on appeal by deft.
Jan.	17, 1944	File Transcript of Evidence.

IN UNITED STATES DISTRICT COURT

Transcript of Evidence

Be It Remembered, That on this 15th day of June, 1943, the above entitled and numbered cause came on for trial before the Honorable Royce H. Savage, United States District Judge for the Northern District of Oklahoma, at Tulsa, in said district, whereupon the following proceedings were had and done, to-wit:

Appearances: Mr. Whit Y. Mauzy, United States District Attorney for the Northern District of Oklahoma, At-

torney for the Plaintiff. Mr. Charles R. Gray, of Pawhusk Oklahoma, Attorney for the Defendant.

* * * * * * *

GEORGE PITTS, called as a witness on behalf of the plaintiff, and being first duly sworn and examined at the time and place above mentioned, testified as follows:

Direct Examination.

By Mr. Mauzy:

Q. State your name, please sir?

[fol. 67] A. George Pitts.

Q. You inherited certain land from Mamie Fletcher Pitts your wife, did you not?

A. Yes, sir.

Q. When did you take possession of the land you inherited from Mamie?

Mr. Gray: Objected to as calling for a conclusion of the witness.

The Court: Objection overruled.

Mr. Gray: Exception.

A. In 1939.

By Mr. Mauzy:

Q. In 1939. That was after you made the mortgage to Mr. Drummond?

A. Yes, sir.

Mr. Mauzy: That is all.

The Court: Any questions?

Mr. Gray: Yes, sir.

Cross examination.

By Mr. Gray:

Q. George, what did you do when you took possession of those lands?

A. After 1939?

Q. Yes.

A. I didn't do anything.

Q. What did you do with them?

A. I leased them.

Q. You had leased them before that, hadn't you?
A. I don't think so. I don't remember it.
Q. You don't remember?
A. No.
Q. You don't remember whether you ever leased them before 1939, do you?
A. No.
Q. But in 1939 you began to lease them, is that right?
A. Yes sir.
Q. Who leased them before that?
A. The Agency leased them, I suppose.
[fol. 68] Q. Well, the Agency leased them after that too, didn't they George?
A. I think so, but I leased them, I signed them.
Q. What you mean is you didn't sign the leases until 1939, is that right?
A. That is right.
Q. And before that the Superintendent of the Osage Agency leased them?
A. Yes sir.

Mr. Gray: That is all.

(Witness excused.)

G. C. Thompson, recalled as a witness on behalf of the plaintiff, and being duly examined at the time and place above mentioned, testified as follows:

* * * * * * *

Cross-examination.

By Mr. Gray:

Q. Mr. Thompson, you say you have been an employee of the Osage Agency for about twenty years?
A. Yes, sir, since 1920.
Q. Have you been connected with the Leasing Department during that time?
A. Not directly most of the time. May I make a statement in connection with that?
Q. Yes.

A. For the last nine years I have been Field Agent in charge of the sub-agency at Fairfax.

Q. Mr. Thompson, leases for Indians who are deceased, that is full blood, non-certificate of competency Indians, are now being executed by the Superintendent of the Osage Agency, are they not?

A. Yes sir.

Q. And that has been the practice for a number of years, hasn't it, Mr. Thompson?

A. No, it just began a few months back.

Q. The rentals from these lands are collected by the Superintendent of the Osage Agency, are they not?

[fol. 69] A. They are.

Q. And they have been for several years back?

A. Yes sir, always, so far as I know.

Q. Even though the Administrator may have signed the lease he never collected the rent, did he, Mr. Thompson?

A. No.

Q. The rent was always collected by the Superintendent for the Osage Agency and went into the account of the deceased Indian?

A. Yes sir.

Q. And none of the rental on these leases was collected by George Pitts, was it?

A. No sir.

Q. It was all collected by the Superintendent of the Osage Agency?

A. That is right.

Mr. Gray: That is all.

* * * * * * *

Fred G. Drummond, called as a witness on behalf of the defendant, and being first duly sworn and examined at the time and place above mentioned, testified as follows:

Direct examination.

By Mr. Gray:

Q. State your name, please?

A. Fred G. Drummond.

Q. You are the defendant in this action, Mr. Drummond?

A. I am.

Q. And you brought the suit in the State Court to foreclose the mortgage given to you by George Pitts on the land which he had inherited from Mamie Pitts?

A. Yes sir.

Q. Prior to the time of bringing that suit in the State Court, Mr. Drummond, did you have a conversation with George Pitts relative to the payment of that indebtedness?

A. I did.

Q. About when were they, and tell the substance of those conversations?

[fol. 70] Mr. Mauzy: We object as incompetent, irrelevant and immaterial, and not binding upon the United States.

The Court: I don't believe that is material, Mr. Gray.

Mr. Gray: My purpose in asking these questions, Your Honor, is to show that George Pitts was always ready and willing to pay this obligation, and it was in fact the Government that declined the payment and brought about the litigation, and forced the litigation through the State Court. That is the purpose of this testimony.

The Court: Yes, I understand that, but I don't think that makes any difference.

Mr. Gray: Very well, Your Honor.

The defendant offers to prove, and states the witness will testify, if permitted, that prior to the time of bringing the suit in the State Court he did have several conversations with George Pitts with reference to this indebtedness, and that George Pitts told him that he was desirous of paying the indebtedness, and procuring its payment through the Department of the Interior, and that at the time the revocation of his certificate of competency was discussed with Departmental officials in Washington he was told that the Drummond mortgage was not valid, and that he did no have to pay it if he didn't want to, or that in substance, and that he informed them that he wanted to pay that indebtedness, and desired to have it paid out of his income, and that thereafter there was a meeting of creditors held at the Osage Agency when all of the creditors of George Pitts were invited to come in and discuss with Osage Agency officials the claims against George Pitts; that the witness was present at that time, and that the offer made to the creditors was to pay twenty-five per cent of the amount of the indebtedness owing, and that the witness rejected

that offer and brought the suit to foreclose his mortgage. We will make that offer.

Mr. Mauzy: Same objection, Your Honor please.

The Court: Objection sustained.

Mr. Gray: Exception.

[fol. 71] That is all.

(Witness excused.)

STATEMENT ETC. AS TO COUNTY COURT FILES

Mr. Gray: Now, Your Honor, I have here the County Court files in the administration of the estate of Mamie Pitts, and I don't desire to offer them in evidence unless it is necessary, but I would like to make a statement as to what they show, and see if counsel will agree to that.

The files, including the reports of the Administrator, show that the Administrator never collects any rentals on any of the real estate belonging to the estate, and show no authority from the County Court to make or enter into any lease on any of the lands belonging to the estate, and further show that at the time of the hearing of the final report the Administrator was not allowed a commission on rentals, or a commission on the value of the real estate left by the decedent.

Mr. Mauzy: Your Honor please, I haven't checked those files and I am not in position to admit they show that, but I am agreeable that the files may be introduced, and the Agency will make a copy of them and submit them to the Reporter.

The Court: It should not be necessary to have the entire file in evidence. This is a case that will very likely be appealed.

Mr. Gray: The files will show that, but it will take an examination of all of them to show it.

The Court: In other words, unless some agreement be reached you have got to have everything in the files to show something wasn't there.

Mr. Mauzy: I am in this position, Your Honor, I have never seen them and I don't know.

The Court: Yes, I undersand. I suspect your associates will know.

Mr. Mauzy: I have asked Mr. Airington and he doesn't know, and Mr. Barney seems in the dark. Of course he

isn't an associate, but he is appearing here as a friend. [fol. 72] Mr. Gray: I have the final report right here. It will take a minute to look over it, and the order of court approving it, and it shows definitely he was not allowed any fees on the appraised value of any part of the estate. Of course you would have to check the files.

Mr. Mauzy: I would suggest these papers be introduced in evidence, Your Honor, please. They don't appear to be long.

Mr. Gray: If they won't agree I do want to offer them in evidence.

The Court: What is the general policy of the Agency in that respect?

Mr. Mauzy: I don't know, Your Honor please, I am frank to say. Mr. Fulton may be able to advise me, but I am frank to say I don't know.

Mr. Fulton: Well, the Agency would collect the rentals. Lease out the land through the Agency on those approved Government form leases, and they would turn them over to the Administrator to sign them, and then the Superintendent would approve them, and collect the money into the Agency and put the money in the estate, and frequently pay that money back to the general estate in payment of the ordinary expenses of administration. The rent money would go into the till of the estate and become part of the moneys of the estate, so it might have been paid back to them in that way.

The Court: I suspect you had better let the entire file go in, and then in the event of an appeal you could perhaps at that time stipulate what the files show.

Mr. Mauzy: Yes sir.

Mr. Gray: I think to save encumbering the record, Your Honor, I will just offer the final report and the order approving the final report as Defendant's Exhibits No. 1 and No. 2.

Mr. Mauzy: We object as incompetent, irrevelant and immaterial.

The Court: Overruled.

[fol. 73] Mr. Mauzy: Your Honor please, we would like to offer Plaintiff's Exhibits No. 12, No. 13 and No. 14. I notice a supplemental final account and supplemental order, and we would like to have those in too since the others are.

The Court: All right, they will be admitted.

Mr. Gray: I would like just this further thing, if counsel will stipulate with reference to it. That there was no order of the County Court ever made with reference to the leasing of land. Of course the only way we can show that is by showing an absence of any such order in the files. If counsel will look at the files sometime later, may be he will enter into it.

Mr. Mauzy: I notice these leases were all approved by the County Judge.

Mr. Gray: I say there was no order made by the County Court with reference to the leases.

Mr. Mauzy: I am not saying there are at this time, but I do notice they are approved by the County Judge.

Mr. Gray: Will you look through the files later and see whether they are?

Mr. Mauzy: Yes, I will be glad to.

The Court: Mr. Gray says the file does not reflect any order was ever made by the Judge approving the leases. I suggest you enter into that stipulation with the understanding, after you have had an opportunity to examine the files, Mr. Gray is mistaken, then you can reopen for the purpose of withdrawing your agreement or stipulation.

Mr. Mauzy: Yes, I will agree to that with this further statement; unless the approval of the County Court appearing on the various leases that have been introduced in evidence does amount to an order of approval.

The Court: Of course, by your stipulation though there is no order in the files made by the County Court, or revocation in the file made by the County Court. You don't contradict the evidence you have already introduced, which [fol. 74] shows on some of these leases executed by the Administrator that the County Court noted his approval.

Mr. Mauzy: That is correct.

The Court: What you referred to when you said there was no order in the file——

Mr. Gray: That is right, no document presented authorizing the Administrator to lease the lands, or have anything to do with the leasing of the lands. No order made.

The Court: Now is there any further evidence?

Mr. Gray: We have none, your Honor.

The Court: I will take a recess for about ten minutes, then I will hear your arguments.

(Thereupon the further hearing of this cause was recessed for about ten minutes, and when court resumed the following proceedings were had and done, to-wit:)

Mr. Gray: Your Honor, I would like to ask Mr. Thompson two or three more questions.

The Court: All right.

G. C. THOMPSON, recalled as a witness, and being duly examined at the time and place above mentioned, testified as follows:

Further Cross-examination.

By Mr. Gray:

Q. Mr. Thompson, you testified relative to the leasing of lands through the Osage Agency, and finally you said that for several months back the Superintendent of the Osage Agency had been signing leases for the heirs of the deceased Osage Indians, is that correct?

A. Yes, sir.

Q. Now prior to that time who signed the leases for the heirs of the deceased Osage Indians?

A. The custom was for years for the Administrator to sign such leases.

Q. Then after that time?

[fol. 75] A. Then as I recall for a few months back, then either the Superintendent could sign or Administrator could sign during a transition period, and the Superintendent signs all the leases now.

Q. For a time the Administrator signed them?

A. Yes, sir.

Q. Then either the Administrator or Superintendent signed?

A. Yes, sir.

Q. And now the Superintendent signs?

A. Yes, sir.

Q. I will ask you this: Isn't it a fact that the Osage Agency endeavors to look after all the leasing of all these lands belonging to the estates of deceased Osage Indians, and sees to the collection of the rents?

A. Yes, sir, it has been their duty to do that.

Q. And it has been done, is that correct?

A. Yes, sir.

Q. Now the Superintendent signs, Mr. Thompson, for the heirs of the deceased Indians, is that right?

A. That is right.

Q. That is the way he signs it?

A. It is so shown on the lease, Superintendent for the undetermined heirs.

Q. And was that the way the Administrator signed at the time he signed them, for the undetermined heirs?

A. No, it wasn't specified.

Q. Wasn't specified how he signed it?

A. Well, other than sign as Administrator for the estate.

Q. Mr. Thompson, these leases, who does the preparing of them usually?

A. They may be prepared by the force at the Agency, or by the lessee himself.

Q. They were not ever prepared by the Administrator and submitted in there. They were always prepared by the lessee or the Osage Agency?

A. So far as I know they were.

Q. That was the habit and custom?

A. Yes, sir.

Q. And the funds were always paid in on those leases to the Osage Agency?

[fol. 76] A. Yes, sir.

Mr. Gray: That is all.

* * * * * * *

COLLOQUY

Mr. Gray: I would like the record to show that Mr. John L. Airington is appearing here now for Mr. R. A. Barney, Mr. Barney being in the armed services, and the record did show that Mr. Barney has a contract of employment approved by the Secretary of the Interior with George Pitts, and I would like the record also to show that Mr. Airington in behalf of Mr. Barney did appear here, and that he, or he and Mr. Barney together have submitted a typewritten brief to the court.

Mr. Mauzy: And let the record further show he is not appearing on behalf of the United States, and the brief is submitted amicus *curae*.

Mr. Gray: It might be a question as to how he appeared.

The Court: For whom do you appear, Mr. Airington?

Mr. Airington: I appear for R. A. Barney, Your Honor. And I want to say I have no employment by George Pitts, and as a matter of information to the court, I understand from Mr. Barney he has never received any fee for representing George Pitts in the State litigation.

The Court: You do appear?

Mr. Airington: Because of the fact I represent Mr. Barney.

The Court: You appear as pinch hitter for Mr. Barney, and Mr. Barney has requested you to appear because of his interest in this litigation as attorney for George Pitts, is that right?

Mr. Airington: That is true.

[fol. 77] PLAINTIFF'S EXHIBIT No. 16

General Inventory and Appraisement

In the Matter of the Estate and Administration Mamie Fletcher Pitts, Osage Allottee No. 156. Deceased. In County Court.

An inventory of all the Estate, Real and Personal, of said Mamie Fletcher Pitts, deceased, that has come to the possession or knowledge of the undersigned, administrator of said estate.

Inventory

Real Estate	App. Value
Homestead:	
SW¼ of NE¼, NW¼ of SE¼, S½ of SE¼ of Sec. 26, Twp. 28 N., Range 6 E. I. M.	2000.00
Surplus:	
Lots 3 and 4 and S½ of NW¼ of Sec. 3, Twp. 24 N., Range 4 E. I. M.	960.00
W½ of SE¼, W½ of E½ of SE¼ of Sec. 31, Twp. 26 N., Range 6 E. I. M.	1600.00
Lots 1 and 2 and S½ of NE¼ of Sec. 1, Twp. 20 N., Range 10 E. I. M.	960.00

Real Estate	App. Value
Surplus:	
S½ of NW¼ of SW½ and N½ of N½ of N½ of SW¼ of SW¼ of Sec. 2, Twp. 20 N., Range 10, E. I. M.	480.00
Undivided One-Third Interest in and to	
SE¼ of Section 2, Township 24 N., Range 4 E. I. M.	800.00
and all of the NW¼ of Sec. 32, Twp. 29 N., Range 6 E. I. M.	2400.00
E½ of NE¼ and SW¼ of NE¼ and SE¼ of NW¼ of Sec. 33, Twp. 25 N., Range 4 E. I. M.	960.00
SW¼ of Section 1, and N½ of N½ of NE¼ of SW¼, and	960.00
N½ of S½ of N½ of NE¼ of SW¼ of Sec. 2, Twp. 20 N., Range 10 E. I. M.	960.00
[fol. 78] N½ of SE¼, SE¼ of SE¼ of Section 7, Twp. 23 N., Range 8 E. I. M.	720.00
NW¼ of NE¼ of Section 23, Township 24 N., Range 8 E. I. M.	1000.00
Lots 3, 4, and 5, and SE¼ of NW¼ of Section 6; and	1600.00
N½ of NE¼ of NW¼ of Section 17, Township 21 N., Range 9 E. I. M.	160.00
N½ of NE¼, and	400.00
N½ of NW¼ of Section 28, Twp. 23 N., Range 6 E. I. M.	1200.00
NE½ of SW¼, and N½ of SE¼ and SE½ of SE¼ of Sec. 21, Twp. 23 N., Range 6 E. I. M.	800.00
N½ of NE¼, and SW¼ of NE¼, and NE¼ of NW¼ of Section 16, Township 23 N., Range 6 I. M.	1600.00
Lots 6, 7, and 8 in Block 5, in the Tallchief Addition to the Town of Fairfax, Oklahoma	1800.00

Undivided One-Sixth Interest in and To

Lots 2, 3 and 4 and SE½ of SW¼ of Sec. 30, Twp. 24 N., Range 8 E. I. M.	106.66
Total	$21,466.66

Dated this 10 day of November, 1937.

George Pitts, Administrator.

[Oaths of Administrators and Appraisers appear at this point in typewritten record.]

Certificate of Appraisers

We, the undersigned, Appraisers, do hereby certify that, after taking the foregoing oath by us subscribed, we appraised all the property described and mentioned in the above inventory, which has been exhibited to us, setting down opposite each item of said inventory, in figures, the value thereof in money, as by us determined.

A. F. Stephenson, O. L. Taylor, J. L. Duncan, Appraisers.

Witness our hands, this 22 day of November, A. D. 1937.

[Bill of Appraisers appears at this point in typewritten record.]

Filed Nov. 27, 1937. Sam Gilmore, Court Clerk. Service Accepted and copy received Nov. 27, 1937. C. L. Ellis, Supt. Osage Agency. By H. H.

Defendant's Exhibit No. 1

Final Account of Administrator. Checked with Carmen Gaddis 7-25-38 G. H.

State of Oklahoma, Osage County, ss. In the County Court of said County

To the Judge of said Court:

The undersigned, as the administrator of the estate of Mamie Fletcher Pitts, Osage Allottee No. 156, deceased, respectfully submits the following as a full and cor-

rect account and report of his administration as such administrator from date of appointment to the 30th day of June, 1938, which account exhibits not only the debts which have been paid, but also contains a statement of all the debts which have been presented and allowed during the period embraced in this account.

Administrator charges himself with the following, to-wit:

[fol. 80]

Date	Items of Receipt	Amount	Total Amount
1937			
Aug. 13	Osage Indian Agency—payment of claims	1,500.58	
Aug. 21	Osage Indian Agency—family allowance	100.00	
Aug. 26	Osage Indian Agency—court costs.	24.60	
Aug. 31	Osage Indian Agency —Davis Bros. for labor on Storm Cave 358.00 Construction Dept. Osage Agency, storm cave 14.32	372.32	
Sept. 16	Osage Agency—for purchase of lands in connection with partition suit # 14571	1,103.47	
Sept. 27	Osage Agency—C. F. Lake, Bond premium 10.00 Brown Motor Co. — claim 6.76	16.76	
Nov. 1	Osage Agency—family allowance.	100.00	
Nov. 5	Osage Agency—ins. premium on Buick car	87.68	
Nov. 24	Osage Agency—court costs	12.70	
Dec. 2	Osage Agency—family allowance.	100.00	
Dec. 7	Osage Agency payment of claims.	586.35	
Dec. 22	Osage Agency—transcript fee	15.50	
Dec. 28	Osage Agency — ins. prem. on property	6.86	
Dec. 28	Osage Agency — family allowance	100.00	

[fol. 81]

1938			
Jan. 8	Osage Agency—appraisers' fees.	94.00	
Jan. 13	Osage Agency—repairs to pick-up.	82.14	
Jan. 29	Osage Agency—family allowance.	100.00	
Feb. 17	Osage Agency—license tags 54.40 Notary fee on license tags 1.50	55.90	
Feb. 24	Osage Agency—appraisers' fees—supplemental appraisement	11.00	

Feb. 25	Osage Agency—payment of claims		106.33
Feb. 26	Osage Agency—partial distribution		1,389.72
Mar. 1	Osage Agency—family allowance		100.00
Mar. 17	Osage Agency—ins. prem. on truck	107.50	
	Court costs	17.65	125.15
Apr. 1	Osage Agency—family allowance		100.00
Apr. 29	Osage Agency—insurance on Pick-up		77.25
Apr. 30	Osage Agency—family allowance		100.00
May 5	Osage Agency—payment of claim		575.34
Aug .12	1937, Osage Agency—for purchase of monument		500.00
Oct. 19	1937, Osage Agency—family allowance for five (5) months		500.00
[fol. 82]			
Dec. 23	1937, Osage Agency—terazzo, slab for monument		135.00
May 27	1938, Osage Agency—partial Distribution		4,900.00
	Total amount of money received or collected		$13,078.65

DEFENDANT'S EXHIBIT NO. 2

In the County Court of Osage County, Oklahoma, In the Matter of the Estate of Mamie Fletcher Pitts, Osage Allottee No. 156, Deceased. George Pitts, Administrator No. 4347.

Order Approving Final Report and Determination of Heirs.

* * * * * * *

The Court further finds that the report filed herein by the said administrator covers a period of time from the date of his appointment up to and including the 30th day of June, 1938, and that during said period of time the administrator has received the sum of $13,078.65, and that all of said funds came to the said administrator out of the estate of Mamie Fletcher Pitts, which estate was in the hands of the Superintendent of the Osage Agency.

* * * * * * *

The court further finds that since the filing of said final report the said administrator has received the sum of $1010.00 and has disbursed the same as follows:

To the Special Disbursing Agent of the Osage Agency, for the use and benefit of William Fletcher,	$1,000.00
To C. F. Lake, for bond premium,	10.00
Total	$1,010.00

• • • • • • •

The court further finds that the administrator, George Pitts, is entitled to the fees authorized by the statutes of Oklahoma on the sum of $14,088.65, said fees amounting to [fols. 83-84] the sum of $577.21, which amount is hereby allowed to the said administrator.

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Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION

Fourth Day, May Term, Thursday, May 25th, A. D. 1944. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Norman MacDonald, Esquire, appearing for appellant, Charles R. Gray, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Norman MacDonald, Attorney, Department of Justice (Norman M. Littell, Assistant Attorney General, and Whit Y. Mauzy, U. S. Attorney, were with him on the brief) for Appellant.

Chas. R. Gray (W. N. Palmer was with him on the brief) for Appellee.

Before Bratton, Huxman and Murrah, Circuit Judges

OPINION—August 1, 1944

HUXMAN, Circuit Judge, delivered the opinion of the court:

George Pitts and Mamie Pitts, husband and wife, were full blood Indian members of the Osage Tribe of Indians. No certificate of competency was ever issued to Mamie Pitts. Such a certificate was issued to George Pitts, July 11, 1910, and remained in full force until June 24, 1938, when it was revoked by the Secretary of the Interior. Mamie Pitts died intestate May 24, 1937, seized and possessed of real estate which included her allotment. George Pitts was appointed administrator of her estate by the proper county court. On September 9, 1938, the county court entered an order adjudging George Pitts to be her sole heir at law, and directed distribution of the estate to him. On July 12, 1937, George Pitts gave Fred G. Drummond a note for $2,500, and secured it with a mortgage on the real estate [fol. 86] which he inherited from his wife. His certificate of competency was revoked shortly thereafter. The note was not paid, and Drummond instituted foreclosure proceedings on the mortgage in the state court. The government was not a party to that suit. Pitts was represented by an attorney of his own choosing. His employment was approved by the Secretary of the Interior, who also approved the expenses of that litigation, including attorneys' fees. The Secretary also approved an appeal to the Supreme Court of the State of Oklahoma, and an application for certiorari to the Supreme Court of the United States. The attorney in that litigation was, however, not authorized to appear for or represent the United States. The Supreme Court of Oklahoma upheld the validity of the mortgage and of the foreclosure proceedings. See Pitts v. Drummond, 118 P. 2d 244.

After the judgment of foreclosure in the state court became final, the United States government in its own behalf and in behalf of George Pitts, instituted this action to cancel the sheriff's deed and to quiet title. The government has appealed from a judgment denying the relief prayed for. It is the government's contention that the mortgage to Drum-

mond was void under Section 7 of the Act of April 18, 1912, because it was executed prior to the adjudication of heirship and order directing the distribution of the estate of Mamie Pitts to her heir, George Pitts, and that the mortgage was also void under Section 3 of the Act of February 27, 1925, because it was executed without the approval of the Secretary of the Interior.

The question in this case is identical with the one that was decided by the Supreme Court of Oklahoma in Pitts v. Drummond, supra. The Oklahoma Supreme Court in a large measure followed the decision by the United States District Court for the Northern District of Oklahoma in United States v. Mullendore, 30 F. Supp. 13. In the Mullendore case, the husband of the deceased Osage allottee was not a member of the Osage Tribe. Judge Kennamer held that the Act of April 18, 1912, applied to Osage allottees alone and to their Osage Indian heirs, but that it did not manifest an intent to protect non-members of the tribe. He held that where the heir was a non-member of the tribe, his right to alienate was controlled by Section 6 of the Act of [fol. 87] 1912, and that under it, all restrictions were removed as to non-Osage Indian heirs. He further held that if Section 7 did apply, the heir in that case had the right to alienate the inherited land, because at the time the mortgage was given, the land had actually been turned over to him, although no adjudication of heirship had been made.

The Oklahoma Supreme Court, as an additional reason for its decision, held that, assuming that Section 7 operated to reimpose restrictions upon the alienation of lands inherited by an Osage Indian having a certificate of competency until the final distribution of the estate by the county court, it did not apply in this case, because since the deceased was a full blood restricted Osage Indian, her lands were not subject to payment of debts and therefore were not subject to the control or jurisdiction of the probate court and that therefore there was no tribunal or person with power or authority to turn these lands over to the heir. This reasoning leads to the incongruous result that Congress intended to throw greater protection around unrestricted land inherited by an Osage Indian than around restricted land inherited by the same Indian.

Section 2(7) of the Osage Allotment Act of June 28, 1909, 34 Stat. 539, authorized the Secretary of the Interior

to issue certificates of competency to such Osage Indian allottees as he thought were competent to manage their own business affairs. A certificate of competency had the effect of removing restrictions from all allotted property except the homestead. It did not, however, remove restrictions from inherited lands. Under the Act of 1906, the inherited lands of an Indian having a certificate of competency became subject to all debts contracted prior to the issuance of such certificate.

Section 3 of the Act of 1912 conferred jurisdiction upon the Oklahoma courts having probate jurisdiction to administer estates of Osage Indian allottees and to determine heirship in such estates. Section 6 provided for partition by heirs of lands inherited from allottees and removed all restrictions against alienation of inherited lands of Osage Indians who had a certificate of competency. Section 7 protected the inherited property of Indians having a certificate of competency from debts contracted prior to the [fol. 88] receipt of the certificate of competency and against debts contracted prior to the time such lands were turned over to the Indian heir.

Section 6, read by itself, no doubt removes all restrictions against alienation of inherited lands by Osage Indians having a certificate of competency, but the answer to the problem cannot be found by considering Section 6 alone. Section 7 is also a part of the Act and must be considered together with Section 6. Congress had some purpose in mind when it included Section 7 in the Act, and these two sections should be so construed, if possible, as to give effect to both.

It is our conclusion that Section 7 reimposed limited restrictions on such property as was freed therefrom by the issuance of a certificate of competency under Section 6, to the extent that such property was protected against debts contracted prior to the issuance of the certificate, and also against debts contracted between the time of inheritance and the time the property was turned over to the heir.

In our opinion, the decision in this case does not depend upon whether lands of restricted Osage Indians are subject to the jurisdiction of the county court of Oklahoma, in the sense that it may administer such lands and subject them to the payment of debts. The question is, what did Congress intend when it passed Section 3 of the Act of

1912, providing that the property of Osage Indians should in probate matters be subject to the jurisdiction of the courts of Oklahoma? Section 3 evidences a Congressional intent to select the courts of Oklahoma having probate jurisdiction as a tribunal for the purpose of administering estates of Osage Indians and determining heirship.

Title 84, OSA 251, confers jurisdiction upon the county courts to settle estates of deceased persons, to hear and determine questions of fact as to heirship of such persons, and provides that such determination shall be conclusive in the absence of appeal. Title 58 OSA 251 provides that the executor or administrator must take into his possession the entire estate of the decedent, except the homestead and personal property not assets. Title 58 OSA 291 provides for turning over the real estate of the estate.

[fol. 89] The Oklahoma Supreme Court has held that the executor or administrator was entitled to the possession of all real and personal property, with certain exceptions, until the estate is settled and delivered to the heirs, In re Gentry's Estate, 13 P. 2d 156; that the property of one who dies intestate passes to the heirs subject to the control of the county court and to the possession of the administrator, White House Lumber Co. v. Howard, 286 P. 327; Davis v. Morgan, 95 P. 2d 856.

Oklahoma has uniformly held that jurisdiction of the estate of a deceased person is based upon residence and not upon the existence of assets, and that the existence of assets was not necessary to the appointment of an administrator.[1]

The county courts of Oklahoma have full and complete jurisdiction over the estates of deceased persons, including the power to marshal assets for the payment of debts, determine heirship, the right to receive real and personal property and deliver the same to those who have been decreed to be the heirs and entitled thereto.

Congress no doubt had in mind the scope and breadth of the probate jurisdiction of Oklahoma courts when it enacted Section 3 of the Act of 1912. It recognized the neces-

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[1] Wolf v. Gills, 219 P. 350; Hardridge v. Hardridge, 31 P. 2d 596; Stock v. Sentinel Rural & Long Distance Tel. Co., 87 P. 2d 656; Wolfe v. Graham, 90 P. 2d 1067; Griffin v. Hannan, 93 P. 2d 1078.

sity of setting up machinery to determine heirship of Osage Indian allottees so that property could be delivered to those rightfully entitled to receive it. Judge Reeves interpreted the Act of 1912 as "a devolution by the Congress of judicial authority upon the county courts of Oklahoma to determine judicially, among other things, who were rightful claimants to the estate of deceased allottees of the Osage Indian Tribe. It was more than a mere selection of the county court for the performance of a ministerial or executive duty. It involved, as Congress must have intended, a judicial inquiry." Mudd v. Perry, 25 F. 2d 85, 87.

It is our conclusion that by Section 3 of the Act of April 18, 1912, Congress subjected the estates of all Osage In- [fol. 90] dian allottees, whether the same consisted of restricted or unrestricted lands, to the jurisdiction of the county courts of Oklahoma for the purpose of administration. Adjudication of heirship is a step in the administration of an estate. The county court had jurisdiction of Mamie Pitts' estate for the purpose of adjudicating heirship. It took jurisdiction of the estate, adjudicated the heirship, and entered an order directing the delivery of the estate to Pitts.

It is true that the title to real estate vests in the heirs upon the death of the testator, but it is not absolute until heirship is determined and an order of distribution is made. Where real estate of an Osage allottee is unrestricted, the heir, while being the owner thereof, is not entitled to its possession until all debts are satisfied and an order is entered directing the distribution of the property to him. Where the property is restricted, he is not entitled to receive it until his title has been legally adjudicated by an order of the court determining heirship and directing its distribution to him.

The debt for which the Drummond mortgage was given was contracted prior to the order adjudicating heirship and directing the distribution of the estate to Pitts. It follows, from what has been said, that the inherited real estate was not subject to the payment of this debt and that the mortgage given to secure its payment was void.

The conclusion we have reached makes unnecessary a consideration of the government's contention that the mortgage was void under Section 3 of the Act of February 27,

1925, because it was executed without the approval of th Secretary of the Interior.

Reversed and remanded, with directions to proceed i conformity with the views expressed herein.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT

Thirty-ninth Day, May Term, Tuesday, August 1st, A. I 1944. Before Honorable Sam G. Bratton, Honorable Wa ter A. Huxman and Honorable Alfred P. Murrah, Circu Judges.

[fols. 91-92] This cause came on to be heard on the tra script of the record from the District Court of the Unite States for the Northern District of Oklahoma and wa argued by counsel.

On consideration whereof, it is now here ordered and ad judged by this court that the judgment of the said distri court in this cause be and the same is hereby reversed; an that this cause be and the same is hereby remanded to th said district court for further proceedings in accordanc with the views expressed in the opinion of the court.

[fols. 93-118] Petition for Rehearing covering 24 page omitted from this print. It was denied, and nothing mo by order of Aug. 28, 1944.

[fols. 119-120] IN UNITED STATES CIRCUIT COURT O APPEALS

ORDER DENYING PETITION FOR REHEARING

Fiftieth Day, May Term, Monday, August 28th, A. I 1944. Before Honorable Sam G. Bratton, Honorable Wa ter A. Huxman and Honorable Alfred P. Murrah, Circu Judges.

This cause came on to be heard on the petition of appell for a rehearing herein.

On consideration whereof, it is now here ordered that th said petition be and the same is hereby denied.

In United States Circuit Court of Appeals

Order Staying Mandate

Second Day, September Term, Wednesday, September 6th, A. D. 1944. Before Honorable Orie L. Phillips and Honorable Sam G. Bratton, Circuit Judges.

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 121] Supreme Court of the United States

Order Allowing Certiorari—Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Roy St. Lewis. File No. 48,973, U. S. Circuit Court of Appeals, Tenth Circuit, Term No. 520. Fred G. Drummond, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 30, 1944. Term No. 520 O. T. 1944.

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 520

FRED G. DRUMMOND, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

Petition for writ of certiorari to the Circuit Court of Appeals of the Tenth Circuit, and Brief in Support Thereof.

Chas. R. Gray,
W. N. Palmer,
Pawhuska, Oklahoma.

Roy St. Lewis,
Natl. Press Bldg.,
Washington, D. C.

Counsellors for Petitioner.

INDEX

(Italics in this brief are ours for emphasis)

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No.———————

FRED G. DRUMMOND, Petitioner,

-vs-

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS OF THE TENTH CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice, and to the Associate Justices of the Supreme Court of the United States.

Your petitioner, Fred G. Drummond, most respectfully represents and shows to you as follows:

HISTORY OF THE CASE.

Petitioner, Fred G. Drummond, instituted an action in the district court of Osage county, Oklahoma, on October 24, 1939, against George Pitts for money judgment on a note and to foreclose a mortgage executed by Pitts on July 12, 1937, on land which he had inherited from his deceased wife, Mamie Pitts, who was a full-blooded Osage Indian who had

never been granted a certificate of competency.

George Pitts defended that action, claiming the land was restricted against voluntary alienation without the approval of the Secretary of the Interior, alleging that he was a full-blood Osage Indian and that the certificate of competency, which had been granted to him on July 11, 1910, by the Secretary of the Interior, was revoked on June 24, 1938, over eleven months after the mortgage had been given to Drummond.

Pitts alleged and contended that the mortgage to Drummond was invalid by reason of section 7 of the Osage Act of April 18, 1912 (37 Stat. L. 86) and for another reason which is not involved here.

Section 6 of the same act provides for the partitioning of inherited lands and further as follows:

> "Sec. 6. . . . . *When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.* If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them *without the intervention of an administrator*".

Section 7 of the act is as follows:

> "Sec. 7. That the lands allotted to members of the Osage Tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or

obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage Tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. *That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs;* Provided, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid under order of the county court of Osage county, state of Oklahoma; Provided further, That nothing herein shall be construed so as to exempt any such property from liability for taxes".

The district court of Osage county, Oklahoma, held against George Pitt's contention and he appealed to the Supreme Court of Oklahoma where the trial court was affirmed (Pitts v. Drummond, 198 Okl. 574, 118 P(2d) 244.)

Then Pitts made application to the Supreme Court of the United States for writ of certiorari to the Supreme Court of Oklahoma, which application was denied on March 2, 1942, Pitts v. Drummond, 315 U. S. 814, 62 S. Ct. 799, 86 L. Ed. 1212.

On April 29, 1942, the United States brought this action in the United States District Court for the Northern District of Oklahoma, in its own behalf and in behalf of George Pitts, to cancel the mortgage from Pitts to Drummond, alleging the same reasons and making the same contentions concerning the invalidity of the mortgage as had been made by Pitts in the

state court and in his petition to this court for writ of certiorari (Rec. p. 1).

The united States District Court made findings of fact and conclusions of law (Rec. p. 54) and rendered judgment in favor of the defendant Drummond (Rec. p. 59).

The United States appealed to the Circuit Court of Appeals Tenth Circuit where an opinion was rendered on August 1st, 1944, reversing the trial court and holding the mortgage invalid (Rec. p. 85).

The holding is that under the provisions of the second sentence of section 7 of the Act of 1912 the mortgage was invalid because it was executed before the heirs of Mamie Pitts were determined.

DATES.

George Pitts, an Osage Indian, was granted a certificate of competency July 11, 1910.

His wife, Mamie Pitts, a full-blood Osage Indian, who was never granted a certificate of competency, died May 24, 1937.

On July 12, 1937, George Pitts gave the mortgage on the lands inherited by him from his deceased wife, Mamie.

The certificate of competency held by George Pitts was revoked by the Secretary of the Interior on June 24, 1938,

nearly a year after the mortgage had been given.

The heirs of Mamie Pitts were determined by the County Court of Osage county, Oklahoma, September 9, 1938 (Rec. 44, 3).

Drummond instituted his action to foreclose the mortgage in the district court of Osage county, Oklahoma, on the 24th day of October, 1939 (Rec. 44, 45, 6, 14).

FACTS.

There has been no dispute as to the facts.

CONTENTION OF THE UNITED STATES.

It has not been contended that the debt was unjust or invalid, but merely that the mortgage was invalid because it was executed before the heirs of Mamie Pitts were determined.

CONTENTION OF PETITIONER.

Your petitioner contends:

1. That section 6 of the Act of April 18, 1912, (37 Stat. L. 86) removed all restrictions against alienation of inherited lands in the hands of an heir with a certificate of competency.

2. That the second sentence of section 7 of the Act was intended merely to protect the estate of a decedent from a creditor of an heir during the time that the administrator

was entitled to possession, and was not intended to forever prohibit such creditor from securing satisfaction from the inherited property merely because the debt was created before the heirs were determined.

3. That the administrator never had and was not entitled to have possession of the land of Mamie Pitts for the reason that it was her restricted land and was not an asset of her estate which was subject to administration, or which could be taken to satisfy her debts, but descended to and vested immediately upon her death in her heirs, and consequently there was no turning over to be done, or which could be done, by the administrator.

4. That the United States consented to be bound by the state court action in that Ralph A. Barney, counsel for Pitts, was employed by the approval of the Secretary of the Interior and the Secretary of the Interior aided in the state court litigation by assisting Pitts' counsel, approving supersedeas bond, advancing the necessary costs and expenses from Pitts' funds, by approving the appeal to the Supreme Court of Oklahoma and the making of the application to the Supreme Court of the United States for the writ of certiorari to the Supreme Court of Oklahoma.

Reasons for granting the petition for writ of certiorari.

A.

The case involves the construction of an Act of Congress

lating to the Osage Indians, and the opinion of the Circuit urt of Appeals adveresely affects the title to lands in Osage unty, Oklahoma, which had been considered secure for many ars.

B.

The decision is in direct conflict with the decision of e Supreme Court of Oklahoma in the case of Pitts v. rummond, 198 Okl. 574, 118 P(2d) 244, and is in direct nflict with the implication to be drawn from the decision this court in denying the application of Pitts for writ of rtiorari to the Supreme Court of Oklahoma, 315 U. S. 814, S. Ct. 799, 86 L. Ed. 1212. Evidently this court found error or injustice in the Oklahoma Supreme Court decision.

C.

The decision is in conflict with applicable decisions of e Supreme Court of the United States. Kenny v. Miles, 258 S. 58, 63 L. Ed. 481.

D.

The decision is in conflict with other Circuit Court of ppeals decisions, United States v. LaMotte, 67 Fed (2d) 788.

E.

The decision is in conflict with the United States District urt opinion in the case of United States v. Mullendore, 39 Supp. 13, which decision became final.

F.

The decision is in conflict with Interior Department interpretation of thirty years standing. Opinion of the Honorable Preston C. West, Assistant Attorney General to the Secretary of the Interior of March 23, 1914.

G.

The decision is in conflict with the policy of Congress to permit Indians with certificates of competency to conduct their affairs as any other citizen.

H.

The decision is in conflict with the clear and expressed intention of Congress and is in conflict with logical reasoning.

I.

The decision is in conflict with the Oklahoma Supreme Court's interpretation of the Oklahoma laws.

J.

The decision is in conflict with the case of United States v. Candelaria, 270 U. S. 432, 70 L. Ed. 1030, and the Circuit Court of Appeals opinion in the same case, 16 F. (2d) 559.

K.

There is attached hereto a transcript of the record, certified to by the clerk of the Circuit Court of Appeals of the tenth circuit on September 15, 1944.

Wherefore your petitioner prays that a writ of certiorari issue under seal of this Court to the Circuit Court of Appeals

of the Tenth Circuit commanding said court to certify to this Court a full and complete transcript of the record of the proceedings in said Circuit Court of Appeals had in the case numbered and entitled on the docket, No. 2895 United States of America, appellant, versus, Fred G. Drummond, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that judgment rendered in said Tenth Circuit Court of Appeals be reversed by this Court and for such further relief as this Court may deem proper.

Dated at Pawhuska, Oklahoma, this 25th day of September, 1944.

Chas. R. Gray,
W. N. Palmer,
Pawhuska, Oklahoma.
Roy St. Lewis,
Natl. Press Bldg.,
Washington, D. C.
Counsellors for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals of the Tenth Circuit is printed in full in the record pages 85 to 90. The decision was rendered August 1, 1944, and petition for rehearing was denied August 28, 1944.

II.

JURISDICTION.

The jurisdiction of the Court is covered by the Judicial Code, section 240a, as amended by the Act of February 13, 1925, and as provided by Rule 38 of this Court adopted February 13, 1939. The date of the judgment to be reviewed is August 1, 1944.

III.

STATEMENT OF THE CASE.

A statement has been made in the petition and will not be repeated here.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals of the Tenth Circuit erred in the following particulars:

1. In reversing the judgment of the United States Dis-

trict Court for the Northern District of Oklahoma.

2. In holding that section 7 of the Act of Congress of April 18, 1912, restricted the inherited lands against voluntary alienation by an heir who held a certificate of competency.

3. In failing to hold that in the situation section 6 of the Act of April 18, 1912, was controlling.

4. In failing to follow precedent.

5. In refusing to follow the interpretation of the Oklahoma Supreme Court of the Oklahoma law.

6. In refusing to adopt the interpretation of the Interior Department.

7. By erroneous reasoning.

8. In holding the mortgage to Drummond invalid.

9. By refusing to hold that the United States had consented to be bound by reason of its assistance in the state court action and in refusing to hold that the United States was therefore estopped from maintaining this action.

V.

ARGUMENT.

1. The legality and justness of the indebtedness is admitted.

Neither the legality nor the justness of the indebtedness owing from George Pitts to the petitioner has ever been questioned either by George Pitts or by the United States

throughout the entire course of the litigation.

2. Congress has specifically directed the payment of the indebtedness owing from Pitts to petitioner.

Section 4 of the Osage Act of February 27, 1925, 43 Stat. L. 1008 (25 U. S. C. A. sec. 331, note) provides:

"Sec. 4. Whenever the Secretary of the Interior shall find that any member of the Osage Tribe of more than one-half Indian blood, to whom has been granted a certificate of competency, is squandering or misusing his or her funds, he may revoke such certificate of competency after notice and hearing in accordance with such rules and regulations as he may prescribe and thereafter the income of such member shall be subject to supervision and investment as herein provided for members not having certificates of competency to the same extent as if a certificate of competency had never been granted; Provided, *That all just indebtedness of such member existing at the time his certificate of competency is revoked shall be paid by the Secretary of the Interior*, or his authorized representative, out of the income of such member, in addition to the quarterly income hereinbefore provided for; And provided *further, That such revocation or cancellation of any certificate of competency shall not affect the legality of any transactions theretofore made by reason of any certificate of competency*".

The meaning of this section is clearly stated by the opinion of the Tenth Circuit Court of Appeals in the case of United States v. Sands, 94 F.(2d) 156, which involved a mortgage on land, but not inherited land. We quote from the syllabus of that case:

"8. The revocation of a certificate of competency

of an Osage Indian, who was vested with title to land subject to a valid mortgage lien securing notes, did not affect the rights of the owner and holder of the notes and mortgage. Act Feb. 27, 1925, sec. 4, U. S. C. A. sec. 331 note.

"13. Where an Osage Indian, at the time notes and a mortgage were executed, held a certificate of competency, the owners and holders of the notes and mortgage had a right to rely on the statute requiring the payment by the Secretary of the Interior of all just indebtedness existing at the time of the revocation of such certificates and providing that such revocation or cancellation shall not affect the legality of any transactions theretofore made by reason of the issuance of a certificate of competency. Act Feb. 27, 1925, sec. 4, 25 U. S. C. A. sec. 331 note.

"15. The United States is not entitled to have a sale of land under a decree foreclosing a mortgage executed by an Osage Indian prior to revocation of his certificate of competency set aside, to have title quieted in his heirs, and to have an injunction against those claiming under the mortgage, until the indebtedness has been paid".

A compliance with this statute and law would have avoided this litigation entirely, and it should be remembered that the validity and justness of the indebtedness is not questioned.

3. The policy of Congress is to emancipate the Indians.

In furtherance of that policy Congress provided for the granting to the Indian of a certificate of competency to enable him to manage, control, and dispose of his lands the same as any citizen of the United States.

The original Osage Act which authorizes the issuance of

certificates of competency to the Osages provided as follows, (Sec. 7, Act June 28, 1906, 34 Stat. L. 539):

> "Seventh. That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years or during the life of the homestead allottee, if upon investigation, consideration and examination of the request he shall find any such member *fully competent and capable of transacting his or her own business and caring for his or her own individual affairs;* Provided, That upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, *shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States . . .* "

Mr. Justice Hughes says in Levindale Lead & Zinc Mining Company v. Coleman, 241 U. S. 432, 36 S. Ct. 644, 60 L. Ed. 1080:

> "It was provided that upon the issuance of such a certificate of competency the lands of such 'member' except homestead lands, should 'become subject to taxation,' and that 'such member,' except as provided, should have the right to 'manage, control and dispose of his or her lands the same as any citizen of the United States.' "

In Neilson v. Alburty, 26 Okl. 490, 129 P. 847, the Oklahoma Supreme Court, in speaking of the authority of an Osage Indian, with a certificate of competency, said:

(From the opinion p. 849). "'And such member * * * shall have the right to dispose of,' sufficiently comprehensive to warrant the construction contended for. 'To dispose of' means to exercise finally one's power of control over; to pass over into the control of some one else, as by selling; to alienate, to part with, to relinquish, to get rid of."

In Lynn v. Brown, 38 Okl. 209, 132 P. 810, it is said:

(From opinion p. 812). "The certificate of competency provided for by the special act relating to this tribe of Indians and their lands authorized the member to whom it was issued to sell and convey any lands deeded him by reason of that act, except his homestead, which authority was granted only after a finding that the member was fully competent and capable of transacting his or her own business, and caring for his or her own individual affairs. The land was thereafter made subject to taxation, and the member was vested with the full right to manage, control, and dispose of it the same as any citizen of the United States".

There are many similar expressions in the cases.

4. The decision of the Circuit Court of Appeals fails to follow precedent.

The whole of section 6 of the Act of April 18, 1912, is as follows:

"Sec. 6. That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the state of Oklahoma; Provided, That no partition or sale of the restricted lands

of a deceased Osage Allottee shall be valid until approved by the Secretary of the Interior. Where some heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said lands shall be valid when approved by the court and the Secretary of the Interior. *When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.* If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them *without the intervention of an administrator.* The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees".

Section 7 is copied in full in petition (page 2 herein).

The Supreme Court of the United States has interpreted the above quoted and emphasized provision in section 6 in exact accordance with the plain purpose of the language used, in the case of Kenny v. Miles, 250 U. S. 58, 63 L. Ed. 841 39 S. Ct. 417. We quote from the case:

"2. syl. Lands allotted in the name of an Osage

Indian under Act June 28, 1906, whether allotted before or after her death, held, in view of sections 1, 2, 6, 7 and 8 thereof, restricted lands, so that, under Act April 18, 1912, sec. 6, they cannot be sold or partitioned after her death without approval of the Secretary of the Interior, neither she *nor her heirs*, who are of Osage blood and members of the tribe, *having received a certificate of competency.*

(From opinion p. 418.) "The Act of 1912, in its sixth section, treats the restraints applicable to living allottees as also applicable to such of the heirs of deceased allottees as are members of the tribe, and expressly provides that—

'When the heirs of such deceased allottees have certificates of competency . . . . . the restrictions on alienation are hereby removed'.

"Lah-tah-sah died without receiving a certificate of competency. Kenny and Miles, who claim to be her heirs, are of Osage blood and members of the tribe, *and neither has received such a certificate*".

And from the case of United States v. LaMotte, 67 Fed. (2d) 788, from the opinion p. 789:

"The pertinent part of section 6 of the act approved April 18, 1912 (37 Stat. 86), provides:

"When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed".

"(3). The statute is clear and unambiguous, and it was in force at all times material hereto. It removed the restrictions on alienation upon heirs of a deceased allottee having certificates of competency and upon those not members of the tribe."

We think it must be conceded that in view of the admitted facts there was no restriction against alienation of

the land here involved in the hands of George Pitts.

This has been settled law for nearly thirty years.

Sections 6 and 7 of the Act were construed together, when this same question was presented, by the United States District Court in the case of United States v. Mullendore, 30 Fed. Supp. 13, from which we quote:

> "Two questions are presented: First, is section 7 controlling; second, if controlling, is it to be construed to prohibit alienation of inherited land until both lands and moneys are turned over to the heir.
>
> "As to the first question:
>
> "(1). Section 6 of the Act of April 18, 1912, 37 Stat. L. 86, 87, provides, in part: 'When the heirs of such deceased allottees . . . are not members of the tribe, the restrictions on alienation are hereby removed.' Frank DeRoin was not a member of the tribe. Under the provisions of section 6, 'restrictions on alienation' by him are removed. 'Restriction' as used in such acts is synonymous with 'prohibition'. Barnett v. Kunkel, 8 Cir. 259 F. 394, 398. Obviously, the quoted portion of section 7 contains a prohibition against alienation and so imposes a restriction, and if section 7 controls it conflicts with section 6 in so far as non-members of the tribe are concerned.
>
> "(2). It is the duty of the court to construe a statute so as to give effect to each and every part thereof and so as to avoid conflict between various provisions of the statute, 59 C. J. 948.
>
> *'If the language of section 6 is taken to mean what it says, restrictions on alienation of Frank DeRoin's interest in this land are removed by it. This language is clear and definite.* The language of section 7 is not clear, because of the word 'such' preceding 'heir,' but by holding that section 7 applies to heirs not included in the

classification set forth in section 6, all conflict is avoided and each section of the statute has a field for operation without encroaching upon the field in which the other section operates.

"(3). Reading the Act of April 18, 1912, as a whole, there is apparent in it a purpose to protect Osage allottees and their Osage Indian heirs through the imposition of restrictions upon the alienation of their allotted lands and trust moneys, but there seems to be no policy for the protection of non-members of the tribe, the implication being to the contrary. Compare Levindale Lead and Zinc Co. v. Coleman, 241 U. S. 432, 36 S. C. 644, 60 L. Ed. 1080; Sec. 5, Act of March 2, 1929, 45 Stat. L. 1478, 1481, 25 U. S. C. A. sec. 331, note.

"(4). *I therefore conclude that the question of the alienation of Frank DeRoin's interest in the lands of Mary Black DeRoin is controlled by the provisions of section 6 rather than by the provisions of section 7 and that the lease and mortgage were and are valid.*"

"As to the second question:

" 5, 6) Even were Section 7 applicable here, it is still my opinion that section does not invalidate the lease and mortgage. The language of the statute is 'that no lands or moneys inherited . . . . . shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heir,' but the Courts have many times held that 'and' in a statute may be read to mean 'or'. Exparte Clark 4, 30 Okl. Cr. 259, 236 P. [illegible]; State v. Hooker, 22 Okl. 712, 98 P. 964; State v. Co[illegible] 70 Mont. 355, 225 P. 1007; Alexander v. State, 84 Tex. Cr. 75, 204 S. W. 644. There seems to be no logical reason for maintaining restrictions on the land until such time as the money may be turned over to the heir. A contrary holding would make the title to lands dependent upon matters which could not be ascertained from land records and would tend to make such lands unmarketable.

"(7). There is some contention that the land had not been 'turned over' to DeRoin at the time he executed the instruments in question but I cannot subscribe to that construction of the language quoted. The phrase is not a technical one and it is my view that the requirement of the statute is satisfied when the heir is placed in possession of the property. Technical consideration of whether or not DeRoin acquired his title upon the death of the ancestor or upon the date of the decree of distribution or at some intermediate time seems to be beside the point here, although it may be noted that the statutes of Oklahoma provide the administrator of the estate takes possession only for the purpose of administration and as soon as it appears that the lands are not necessary for the payment of debts, the lands shall be delivered to the heirs. Sec. 1193, 1218, Okl. Stat. 1931, 58 Okl. St. Ann. sec. 251, 291".

Please note that the opinion first holds that the situation is controlled by section 6, and then holds that section 7 cannot apply.

Frank DeRoin was an Indian but not of the Osage Tribe. Note that section 6 places the non-member of the tribe and the member with a certificate of competency in the same class. As to both the restrictions "are hereby removed".

If section 7 applies, it should be construed as applying to only those persons who are not exempted from its application by section 6.

The reasoning in the opinion in the **Mullendore** case is sound. Obviously, if there is a conflict in the two sections, they must be construed together and as Congress has so unequivocally by section 6 removed all restrictions against

lienation by the Indian with a certificate of competency and y the non-member of the tribe, it is definitely certain that Congress was not intending to reimpose those restrictions by he next section on the certificate of competency Indian and n the non-member of the tribe. That conclusion is rendered ndubitably certain by the fact that the non-member of the ribe was frequently a white person without any Indian blood, nd, if respondent's interpretation is to be followed, Congress y section 7 imposed restrictions upon those white heirs.

Therefore section 7 must be construed as not restricting hose persons liberated by section 6, namely, the non-member nd the certificate of competency member, or it must be construed as intended only to prohibit interference with the ossession of the administrator for the time only in which he as entitled to possession. Either construction makes the ecision of the Circuit Court of Appeals erroneous.

5. The decision is in conflict with Departmental interpretation.

The following quotation is from the opinion of the Honorble Preston C. West, Assistant Attorney General, concerning he 1912 Act, rendered to the Honorable Secretary of the nterior on March 23, 1914:

> "The intent of Congress as gathered from these two acts (1906 and 1912) was to place members of this tribe in complete control of their property, relieved of supervision of the Government, as rapidly as might be done with due regard to the interests of the individuals. The effect of a certificate of competency as stated in the act of 1906 was to confer upon the member 'the right to manage, control, and dispose of his or her lands the same

as any citizen of the United States'. Apparently there was no doubt whether this declaration related to lands inherited from an Osage allottee who had not received a certificate of competency even though the heir held such certificate. The District Court, in deciding the case of United States v. Aaron, September 6, 1910, (183 Fed. 347) had said that the restrictions ran with the land and was effective against alienation after it descended to the heirs. No exception was noted as to those of the heirs who had received certificates of competency and thus been given full control of their own allotments. It seems fair to presume that this provision was inserted in the law of 1912 in view of said ruling, and in any event it is apparent that the purpose was to afford competent Osages and non-members relief from conditions which they naturally regarded as burdensome and *to give them the same control over inherited lands that competent Osages have over their original allotments.* * * *

"If the allottee had not received a certificate of competency, his lands were restricted at the time of his death, but, by virtue of the act of 1912, became unrestricted in the hands of his heirs having certificates of competency or being non-members of the tribe. Such heirs may sell their respective shares before partition. *No order of the court is necessary* unless the party be insane or otherwise incompetent of acting sui juris under the laws of the state.

"The second question is, can a sale be made 'before partition by all the heirs, if all the heirs are competent; and, if so, must it be by order of the court.

"The first clause must be answered in the affirmative and the second in the negative, assuming always that the parties are not disqualified under the laws of the state.

"Third, does the death of an allottee remove the restrictions on surplus lands and homestead, or an undivided interest therein of a competent heir?

"Death does not remove restrictions except in those cases where the allottee had received a certificate of competency. The act of 1912 removes all restrictions upon inherited lands in the hands of an heir who has received a certificate of competency or is not a member of the tribe".

May it be said that the Osages with certificates of competency have dealt freely with their inherited lands for 30 years, and since the West opinion. No question has been raised as to their right to do so until comparatively recently.

6. The title and right to possession of the land went to George Pitts, the sole heir, upon the death of his wife and there never was thereafter any turning over to him.

The courts have uniformly and consistently held that the restricted lands of a restricted deceased Indian is not an asset of his estate which is subject to administration. The court may determine the heirs but cannot take possession of the real estate.

The only purpose for which the administrator is ever entitled to possession of real estate is to use it to pay the debts of the decedent and as the restricted real estate is not liable for such debts the administrator cannot have possession of it.

See the opinion of the Supreme Court of Oklahoma in Pitts v. Drummond, 198 Okl. 574, 118 P. (2d) and cases therein cited.

The following language is from Swain v. Hildebrand, 169 Okl. 327, 36 P(2d) 942, an Osage case:

> "Thus it has been held that the restricted lands of an Indian are not subject to administration. Cowokochee v. Chapman, 90 Okla. 121, 215, P. 759; Barnard v. Bilby, 68 Okl. 63, 171 P. 444. And that prior to specific enactment of Congress, the state courts had no authority to determine heirs, in so far as it would affect restricted property during the trust period. Gray v. McKnight, 75 Okl. 268, 183 P. 489; Caesar v. Krow, 71 Okl. 233, 176 P. 927. And the income accruing to an Osage headright cannot be sold and transferred by an Osage Indian by blood, because there is no specific congressional authority therefor. DeNoya v. Arrington, 163 Okl. 44, 20 P(2d) 563; Taylor v. Tayrien, 51 F (2d) 884 C. C. A.; In re Dennison (D. C.) 38 F(2d) 662. And that such headright does not pass to the trustee in bankruptcy. Taylor v. Tayrien, supra; In re Dennison, supra; Taylor v. Irwin (C. C. A.) 60 F(2d) 495.
>
> "In Williams v. Hewitt, 74 Okl. 283, 181 P. 286, this court held that there was nothing in the Osage allotment act of 1906 conferring probate jurisdiction on the county courts of this state, and that the subsequent act of 1912 (37 Stat. 86) only operated to confer authority and jurisdiction on such courts to the extent therein expressly provided, thus recognizing the exclusive control of these Indian matters to be in the federal government".

See, also, Rayburn v. Carney, 170 Okl. 255, 39 P(2d) 9.

In the case of In re Thompson's Estate, 179 Okl. 240, 65 P(2d) 442, it was held that the county court had jurisdiction to determine the heirs to restricted property notwithstanding the fact that it was not an asset of the estate for the payment of debts.

In the case of Globe Indemnity Co., v. Bruce, 81 F(2d) 143, the court approved the holding in the case of DeNoya v. Arrington, 163 Okl. 44, 20 P (2d) 563, to the effect that the Osage headright (the community interest in the oil and gas) was not an asset of the estate, except as to the accruing payments which were turned over by the Osage Agency to the administrator.

There could be even less question about restricted real estate of a restricted Osage Indian for there is no provision of any act of Congress which would under any circumstance permit its use for the payment of debts or expenses of administration. The Osage acts do provide for the payment of certain debts from the income from the headright, but the Acts of Congress prohibit the encumbrance or sale by any one or for any purpose of the restricted lands of a restricted Osage Indian.

The opinion of the Circuit Court of Appeals appears to agree to the universally and well-recognized principle of law that the title to real estate passes at once to the heir upon the death of the intestate. 21 Am. Jur. 541, Davis v. Morgan, 186 Okl. 30, 95 P(2d) 856.

Then as George Pitts had the title and possession upon the death of his wife, it cannot reasonably be said that the land had not been turned over to him. He not only had title and possession but he was the owner. He became the owner by reason of the law of succession and the later adjudication that he was the sole heir and owner did not change his title,

his right to possession or his ownership but merely confirmed them, thus constituting an adjudication of facts already in existence, but that adjudication did not change those facts.

The act in question uses the words "turned over" which certainly do not require more than title, possession, and ownership, even though those things had not been established by court decree. The county court cannot turn over the land because the court did not have it. The full extent of the authority of the court as far as this land was concerned was to determine the heirs, and thereby confirm the theretofore existing facts.

In Simon v. Shaffer, 11 Fed. Supp. 450, the United States District Court said:

> "(2) Where there is no administration proceeding pending *or the property involved is not subject to administration*, or all debts have been paid and plaintiff is the sole heir, or the probate court has decreed distribution, heirs have the right to sue without joining the administrator".

Congress has recognized that the administrator was not entitled to the possession of the real estate of a deceased restricted Osage Indian:

By Section 4 of the Osage Act of March 2, 1929 (45 Stat. L. 1478) Congress authorized the administrator of an estate to be paid certain limited funds for certain specific purposes from the income from the headright interest (the community interest in the minerals underlying the Osage Nation, the minerals having been reserved to the Tribe).

Section 2 of the Osage Act of February 27, 1925, (43 Stat. L. 1008) contains a similar provision.

In 1940 Congress gave recognition to the fact that the title, ownership and right to possession of the restricted real estate of a deceased Osage was in the heir, and that the administrator had no right to the possession of it, by providing that the Superintendent of the Osage Agency might lease it until the heirs had been determined, and thereafter, if the heirs were not using it themselves and were unable to agree upon a lease on it. Act July 8, 1940, 54 Stat. 745.

Even in a case where the estate of a white man is involved the administrator is not entitled to possession of the real estate when it is not needed for the payment of debts. Section 291 of Title 58 Okl. Stat. Ann.:

> "291. Term of possession of realty.
>
> "Unless it satisfactorily appears to the probate court that the rents, issues and profits of the real estate for a longer period are necessary to be received by the executor or administrator wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, at the end of ten months from the first publication of the notice to creditors, the court must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees".

The heirs in Oklahoma are not determined for at least one year on account of certain statutory provisions. In Varner v. Clark, 283 F. 17 (C. C. A. 8th, 1822), now the Tenth Circuit, this was said:

"The purposes of the administration of the estates of deceased persons are to secure payment of debts due to or from the estate, and thereafter to distribute any residue to the persons entitled thereto. Where there are no such debts and no question as to the persons entitled to the estate, there exists no logical reason for imposing the burdens, delays and expense of administration upon the estate, or upon the probating tribunals, unless a statute clearly requires such action. We have been cited to no such requirements in the statutes of Oklahoma or of Oregon".

Supposing there had never been a decree determining the heirs, and such a situation is conceivable for many relatives of deceased persons delay or neglect altogether the filing of probate proceedings. Oklahoma has a statute authorizing the quieting of title to inherited property. Title 84 O. S. A. 257.

Suppose this were an instance in which no probate proceeding had been filed and George Pitts had brought a quiet title proceeding as authorized by statute and at the conclusion thereof the court had quieted title in him, would there be any difference in his title, ownership, or possession after than before such a decree? Does not the decree merely confirm them? It finds that he is the owner, has title, and the right to possession. The court merely decreed that he already had previously acquired them under the law of succession and he acquired the right to immediate possession under the same law and under the federal and state law which gave him the right to immediate possession.

It is even conceivable that there might never be a determination of heirs or a quiet title suit as far as the land is

concerned. We have known of a few instances, where the heirs were well known, of title having been passed by competent title examiners where there had never been a determination of heirs or a quiet title suit.

Section 6 of the 1912 Act involved here provides for the payment to competent heirs of the proceeds from partition actions "without the intervention of an administrator".

The Honorable J. R. McCarl, Comptroller General of the United States, in an opinion to the Honorable Secretary of the Interior, dated November 2, 1926, A-15,957, in construing section 6 of this 1912 Act held that under the circumstances provided by section 6 the funds inherited or bequeathed to competent heirs must be paid to them direct without the intervention of an administrator.

7. The purpose of section 7 of the Act of April 18, 1912.

The first sentence of section 7 definitely states that the property of an Indian with a certificate of competency may be taken to satisfy any debt created after the date of the issuance of the certificate of competency, which in the George Pitts case was in 1910.

His wife, Mamie, died in 1937. Certainly Congress was not by the same section endeavoring to reimpose restrictions on George Pitts after so definitely having removed them by section 6, and so definitely providing by the first sentence in section 7 that the certificate of competency should become fully operative on the date of its issuance.

The reason for the enactment of the second sentence of the section seems apparent. At the time of the passage of the 1912 Act any adult Osage, whether he had a certificate of competency or not, could contract valid indebtedness, and such indebtedness could be satisfied from the unrestricted property of the Indian, and by the 1912 act it was expected that the income of a deceased Indian would be paid to the administrator, which was actually done in practice after its passage.

It is the general law that an heir may create a debt and a lien against his share of an estate, particularly real estate, but it is also general law that the creditor of the heir, or the alienee of the heir, cannot interfere with the possession of the administrator as long as the administrator has the right to use the inherited property to pay debts of the decedent. The second sentence of section 7 is merely declaratory of that general law.

It may not have been essential for Congress to so provide, but it was at least a natural and expected provision, for statutes are very often declarations of existing common law principles.

Suppose the deceased was an Osage, who had been granted a certificate of competency, then his land was an asset of his estate which would be liable for his indebtedness and the administrator was entitled to possession of it for the purpose of paying his debts. Such land could not be taken by a creditor of an heir until the administrator of the estate of the decedent had surrendered possession of it.

A reasonable construction of the second sentence of section 7, and one in accord with the plain purpose of Congress and also in accord with the universal law in such matters, would be to prohibit the taking of such lands and moneys prior to the time they are turned over to the heir to secure the payment of any indebtedness incurred by such heir.

In other words, what the sentence does is to postpone the time the creditor of an heir can reach the intestate property to secure satisfaction of his obligation until after the administrator is through with the property. Still in other words, Congress does not declare the debt forever invalid, or does not declare that it can never be collected from the inherited property, simply because it was incurred by the heir before the administrator was through with the inherited property. The words, 'incurred by the heir', are merely descriptive of the indebtedness and the words, 'prior to the time,' of turning over referred to the time that the lands and money may not be taken or sold to satisfy an obligation of the heir. The statement being made is:— That the lands and moneys may not be sold or taken prior to the time they are turned over to the heirs. That is a complete sentence. In it is the clause describing the indebtedness of the heir, for which the property may not be taken until after the "turning over."

The sentence includes money as well as land. Money is often "turned over"—paid to the heirs before a determination of heirs has been had; very frequently a family allowance to the widow or the family, and less frequently partial distributions. Certainly Congress did not intend to say that the

groceryman could never collect his account from such funds merely because he extended the credit before the heirs were determined.

Let it be assumed that there is presented a situation such as this:— George Pitts, an Indian, who has had a certificate of competency for over 25 years, contracted a debt in 1935, and that he inherited land from his wife or some other relative in 1936 and that is was so decreed by the court in 1937, and that there was no question about the inherited land being unrestricted in George Pitts' hands, except for this section 7, then did Congress mean to say that the debt could never be collected from George Pitts' inherited property, or, did Congress intend to say that the creditor could not collect from the inherited property prior to the time it was turned over to George Pitts, or while the administrator was entitled to possession of it?

Obviously Congress intended to legislate concerning the collection of a debt by a creditor of the heir before or prior to the time that the property was turned over to the heir. The heir of an Osage might be a white man. In fact he often is, and Congress merely meant to say that no creditor of any heir could interfere with the administration of the estate of a decedent, and Congress never intended to prohibit for all time the collection of a debt that may otherwise be valid from the inherited unrestricted property merely because it was incurred before the heir received the property.

It is not the contracting of the debt or the voluntary encumbering of the property which is prohibited, but the

forcible taking of it to satisfy the debt, which cannot be done until after the turning over. Drummond's action was not begun until October 24, 1939, and the decree of heirship was entered September 9, 1938.

It is interesting to contemplate that this 1912 act was in force for 25 years, and that during that 25 years the Indians with certificates of competency dealt freely with their inherited property, before any one ever thought to suggest that section 7 reimposed restrictions against alienation upon that inherited property.

If this second sentence of section 7 means what the opinion of the Circuit Court of Appeals appears to hold, then restrictions have been imposed not only upon the Indian heir, who has a certificate of competency, but upon the white heir as well, and there have been many white spouses who were heirs. The opinion seems to hold that the debt of an heir cannot ever be collected from the inherited property, if the debt was contracted before the heirs had been determined, and this is the holding no matter what the status of the heir might be. There is no escape from the conclusion that the holding of the Circuit Court of Appeals brings about that result, which leads to the insurmountable conclusion that that holding cannot be correct for it is evident that Congress never had any such intention.

Then the conclusion must follow that Congress was merely intending to protect the estate of a decedent in the possession of the administrator, in those cases where he was entitled to possession, for as long as he might need that real estate to

satisfy the purposes of the administration. Or it must be concluded that Congress did not intend by sec. 7 to reimpose on the certificate of competency Indian and non-members the restrictions removed by section 6.

8. Points of the Circuit Court of Appeals opinion.

(a). The decision on page 3, (R. 87) and after reciting the holding of Judge Kennamer in United States v. Mullendore, 30 F. Supp. 13, and the holding of the Supreme Court of Oklahoma in Pitts v. Drummond, makes this statement:

> "This reasoning leads to the incongruous result that Congress intended to throw greater protection around unrestricted land inherited by an Osage Indian than around restricted land inherited by the same Indian".

We think the statement overlooks two elements of the situation presented:

(1). Where the lands are unrestricted they are liable for the debts of the heir and the administrator would be entitled to possession of them to use or sell them for that purpose, while if the lands are restricted they cannot be used for that purpose or for any other purpose by the administrator, and, therefore, the heir should not be deprived of possession by the administrator.

(2). Whether the heir can alienate would depend on his status. If he was a white man or if he was an Indian with a certificate of competency, or, under the present law, if he was less than one-half Indian blood, he could alienate. If he was a restricted Indian he could not.

If he was a restricted Indian he needed no further protection for he could not alienate anyway.

Congress was evidently trying to provide protection for e administrator or the estate of the decedent and not for e heir; so that the administrator might properly administer on that portion of the estate of which he was entitled to ve possession and without interference from the heir or creditor of an heir.

(b). On page 5 (R. 89) of the opinion it is stated that the unty court was selected by Congress to perform more than ministerial or executive duty; that the inquiry was judicial.

It is agreed that the county court has authority to judicly try the question as to who are the heirs, but it could t surrender possession of the real estate to them because never had it; it could not oust a trespasser from possession cause it had no such power, which Congress well knew. It uld not distribute anything over which it never had possession control. A wrongdoer in possession would have to be sted by a court of law or a court of equity at a suit by the ir. The administrator could not do it because he did not ve possession or the right to possession.

(c). It is stated (page 4 R. 88) that title 58 O. S. A. 251, ovides that the executor or administrator must take into his ssession the entire estate of the decedent, *'except the homead and personal property not assets'*.

The restricted land of a deceased Osage is in a very milar position to the homestead of a white person. The

administrator does not take possession of it yet the court finally determines who are the heirs of that homestead.

The opinion then calls attention to section 291 which is the section quoted above and which requires the real estate to be turned over to the heirs within ten months if not needed to pay debts.

(d). If it be agreed that no assets are required in order to give the county court jurisdiction to determine heirs, or even to appoint an administrator as stated on page 5 (R. 89) of the opinion, would that not further confirm the position that the restricted lands were not assets, which were subject to administration?

(e). It appears that the opinion recognizes that the administrator was not entitled to the possession of the real estate for it states, page 4, (R. 88) that the decision does not depend upon whether the lands of a restricted Osage Indian are subject to the jurisdiction of the county court in a sense that it may administer upon such land and subject them to the payment of debts.

The administrator of the estate of a restricted Osage Indian does not receive the rentals from the real estate and the county court does not allow him and he does not receive the statutory commission on the rentals or on the value of the real estate, and he did not receive them in this case.

From the entire opinion it is not clear to us whether or not the view is taken that the administrator or the county

court may have possession of the land for any purpose whatsoever.

On page 5 (R. 89) the case of in re Gentry's estate, 158 Okl. 196, 13 P(2d) 156, is cited as holding that the administrator is entitled to possession of all of the real estate and personal property with certain exceptions "until the estate is settled *and* delivered to the heirs." In the opinion in that case that language was used, but in the syllabus by the court, which under the holdings of the Oklahoma Supreme Court is the law of the case, the language is: "Until the estate is settled *or* delivered over to the heirs." The case cited in the opinion also uses the word "or". Under section 291, Title 58 O. S. A. herein quoted, the real estate must be delivered to the heirs when not needed for the payment of the debts, before the estate is settled, and the administrator never has possession of the homestead.

On page 5 (R. 89) of the opinion it is stated that the Oklahoma Supreme Court has held "that property of one who dies intestate passes to the heirs subject to the control of the county court and to the possession of the administrator". We think the statement is correct as a general rule, qualified by the exception that the administrator is not entitled to possession of the homestead, and further qualified by the exception that he is entitled to possession of the other real estate only until it has been determined that it will not be needed for the payment of debts.

It is correct that the county court has the privilege and duty of determining to whom the real estate has descended.

The case of Whitehouse Lumber Co. v. Howard, 142 Okl. 163, 286 P. 327, cited in the opinion, states that "prior to distribution (determination of the heirs) the actual interest of the heir of the intestate is undetermined and subject to determination thereof by the county court".

The decision holds the land descended under the law of succession of the state but that the county court determined just what the interest was. The point in the case was whether the judgment of a creditor of the heir attached as a lien to the heir's interest in the real estate. The court held that it did so attach to whatever real estate was left after the administrator was through with it.

We see nothing in the case that in any way controverts the position that title and ownership passes upon the death of the intestate, and in this case also the right to immediate possession, all of which together certainly constitutes a turning over, and a later adjudication confirming all of those rights cannot affect the fact that the turning over had occurred long prior thereto.

If the question is one of determination of the law of the state of Oklahoma, then the federal courts are bound by the interpretation given to that law by the highest court of the state of Oklahoma. Jackson v. Harris (CCA 10) 43 F. (2d) 513; Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188; United States of America v. State of Texas, 314 U. S. 480. 86 L. ed. 356, and the decision in Pitts v. Drummond, 198 Okl. 574, 118 P(2d) 244, must control, for in that case

the exact question involved here was before the court and the Supreme Court of Oklahoma held as follows, on page 246 of 118 P(2d):

> "It follows that there was no court or officer with power or authority to "turn over" the lands or to deliver them to the heirs. Immediately on the death of the owner they descended to the heirs free from all restrictions together with the absolute right of immediate possession".

The holding of the Circuit Court of Appeals, quoted below, is in direct conflict with the foregoing Oklahoma Supreme Court interpretation of the Oklahoma law.

(f). Page 6 (R. 90) of the opinion contains these statements:

> "It is true that the title to real estate vests in the heirs upon the death of the testator, but it is not absolute until heirship is determined and an order of distribution made. * * *
>
> "Where the property is restricted, he is not entitled to receive it until his title has been legally adjudicated by an order of the court determining heirship and directing its distribution to him".

Is not an adjudication of heirship an adjudication that he does have and has had "an absolute" right to it? Is his right any greater after the adjudication than it was before? Did he not have all of those rights before and was not the decree only a determination that they existed? If his right had not been absolute, would he have been adjudged an heir?

The decree of heirship does not give or create ownership. It is the relationship to the decedent and the law of succession

which creates the title, and the ownership. The decree of heirship simply enables the heirs to easily establish their title and ownership. It is a muniment of title, but it is not the title itself.

It being acknowledged, or at least established, that the administrator is not entitled to receive the land, then who is entitled to receive it or have possession of it upon the death of the intestate? It being acknowledged that the heir has title and that the administrator has no right to possession and no title who, except the heir, can receive it and have possession of it?

If the decision actually means that the heir cannot receive or have possession of the real estate until the heirs have been determined, then it must mean that the administrator is entitled to receive, use and have possession of such real estate and a long line of uniform decisions have been overruled, and the Interior Department must reverse its policy of many years standing and permit payment to the administrators of commissions on the rentals and on the value of the lands of restricted Indians.

If the opinion does not mean that, then the conclusion that the heir had the title and right to possession is irresistable.

9. The United States consented to be bound by the State Court action.

It should be remembered that Barney was employed to represent George Pitts by the approval of the Secretary of

the Interior; that the Secretary of the Interior aided in the state court litigation; approved supersedeas bond: advanced the necessary costs and expenses from the Pitts' funds; approved of the appeal to the Supreme Court of the state of Oklahoma, and the making of the application to the Supreme Court of the United States for writ of certiorari; and that the United States is here undertaking to re-litigate the exact question which was litigated through the state courts and by application for writ of certiorari to the Supreme Court of the United States. (Trial Court Findings IX and X. R. 56).

The Circuit Court of Appeals opinion appears to imply that this question would depend upon whether or not counsel for Pitts was authorized to appear for or represent the United States, but appearance for and representation of the United States is not required in order to estop the United States from maintaining the second action. It is sufficient if the United States by its assistance in the state court litigation consented to be bound by the result of that litigation.

The question then is:— Can the Government, just because it is the Government, compel a private citizen to litigate his cause of action a second time and after his adversary has had and has taken advantage of every possible opportunity to defend against him and carried the litigation to the highest court in the land and been aided, and assisted, by the Government in doing so?

Please understand that it is not claimed that the state

court did not have full and complete jurisdiction in the former action, both, of the subject-matter and of the parties; nor is it claimed that there was any lack of authority or capacity on the part of George Pitts to defend against that action, nor that it was not well and ably defended; nor is it contended that there is any different question involved here than was involved in the former action, and it is alleged and admitted by the government that this present action is for and on behalf of George Pitts.

The contention is simply that the same question may be again litigated after a final decision in the former action by the court of last resort, the first litigation being by George Pitts in his own behalf, and the second litigation being by the government in behalf of George Pitts.

To understand the authorities relied upon by the United States there should first be read the case of United States v. Candelaria, 16 F.(2d) 559, at pages 562, 563; and then the same case, opinion by the Supreme Court of the United States, 271 U. S. 432, 70 L. Ed. 1033, and also the case of Lane v. Santa Rosa, 249 U. S. 110, 63 L. Ed. 604, 39 S. Ct. Rep. 185.

Please note that the state court has jurisdiction and that the United States is not barred from enforcing restrictions against alienation "without its consent".

Then it is determined by the Supreme Court and by the Circuit Court that the United States by authorizing Wilson as special attorney for the Pueblo to represent the Pueblo gave

its consent to be bound by the resulting judgment.

In the case at bar the government had authorized Barney to represent George Pitts. He represented George Pitts exactly as Wilson represented the Pueblo, in the Candelaria case, and he represented George Pitts under specific, direct, and contractual authority from the government.

The fact that the United States furnished the money for the Pueblo in the Candelaria case to pay an attorney is only an incident in connection with the matter and not the controlling fact.

The point is, did the United States by its assistance in carrying on the litigation consent to be bound by the resulting judgment? See Souffront v. LaCompagnie Des Secreries, 217 U. S. 475, 30 S. Ct. 608, 54 L. Ed. 846; Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129.

The United States relies strongly on the case of Logan v. United States, 58 F.(2d) 247. It can be observed that, while the Logan opinion purports to accept the Candelaria case as authority, the distinction made is not justified by the Candelaria opinion.

The Logan decision is then placed upon safer ground that there was no congressional authority for the Secretary of the Interior or the Superintendent of the Osage Agency to appear in state court litigation.

It has been adjudicated that when the United States litigates for an Indian, the Indian cannot relitigate. Heckman

v. United States, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820; Vinson et al., v. Graham, et al, 44 F(2d) 772; Fulson v. Quaker Oil & Gas Co., 35 F(2d) 84; Marrs, et al, v. McDougal, et al, 40 F(2d) 247.

The United States cannot maintain the second action for a beneficiary under the Federal Employers' Liability Act. Chicago R. I. & P. Ry. v. Schendel, 270 U. S. 611, 70 L. Ed. 757.

Where the state court has jurisdiction to entertain a suit in behalf of an Indian the Indian has a right to apply to the Supreme Court of the United States, if not satisfied with the state court decision, and the result should be final and conclusive. 27 Am. Jur. 572, United States, ex rel Kennedy v. Tyler, 269 U. S. 13, 70 L. Ed. 138.

It cannot be successfully contended that the interest of the United States is superior or more inclusive than the interest of George Pitts. His interest was to protect his land against improper alienation. The interest of the government is to protect George Pitts' land against improper alienation.

As was said by the Supreme Court of the United States in the case of Heckman v. United States, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820, the government might bring its own action in behalf of the Indian or it might permit him to bring his own action, "and if so brought, the United States might aid him in its conduct." Then the Court said, "in the opportunity thus afforded there is no room for the vexation of repeated litigation of the same controversy".

As was suggested by the Supreme Court of the United States in Kennedy v. Tyler, 269 U. S. 13, 70 L. Ed. 138, if the decision of the state court was not satisfactory the Supreme Court of the United States was open to redress any wrong that might have been done or to correct any error that might have been committed. George Pitts sought such redress or correction and the Supreme Court of the United States found no merit in his contention.

If George Pitts had a right to alienate this land at the time he gave the mortgage, the United States cannot maintain this action. United States v. Waller, 243 U. S. 452, 61 L. Ed. 843.

SUMMARY.

May it be suggested that Congress intended a construction which would not be imposing restrictions upon white heirs or heirs with certificates of competency but one which would protect the estate of a decedent for proper administration. These points seem clear:

1. Section 6 removed all restrictions on lands inherited by an Indian with a certificate of competency.

2. Section 7 construed along with section 6 excludes the non-member of the tribe and the certificate of competency Indian from its operation.

3. The questioned sentence of section 7 refers only to involuntary subjecting of property to the debt of an heir and not to voluntary alienation.

4. The sentence was meant only to prevent interferenc with the administrator by the creditor of an heir when, an only for so long as, he was entitled to possession and wa not intended to make a valid and just debt forever uncollectabl from inherited property.

5. The title, ownership, and right to possession passe at once to the heir upon the death of the intestate, whic constituted turning over.

6. The United States by its assistance in the Stat Court litigation is estopped from maintaining this action.

Respectfully submitted,

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Sept. 25, 1944.

FILE COPY

No. 520

In the Supreme Court of the United States

October Term, 1944.

FRED G. DRUMMOND, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

REPLY BRIEF of PETITIONER

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Washington 4, D. C.,

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INDEX.

(Italics in this brief are ours for emphasis.)

IN THE SUPREME COURT OF THE UNITED STATES.

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FRED G. DRUMMOND, *Petitioner,*

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REPLY BRIEF *of the* PETITIONER.

This Brief.

The petitioner ascertained from the Clerk of this Court that his brief presented in support of his petition for writ of *certiorari* could be used as his principal brief in this case.

He therefore requests that it be so used. This brief is in reply to the brief on behalf of the United States and is supplemental to petitioner's original brief.

Summary of Argument.

1. The United States assisted George Pitts in carrying on the state court litigation and thereby consented to be bound by the state court judgment. (See original brief, pages 40 to 45).

2. Section 7 of the Act of April 18, 1912, does not re-impose restrictions upon the inherited property of an Osage

Indian with a certificate of competency, but merely protects the administrator of the estate of the decedent in the possession of the property of which the administrator is entitled to possession. To hold otherwise would impose restrictions upon Indians with certificates of competency and upon white heirs and would conflict with Section 6 of the same Act and with the first sentence in Section 7.

3. The respondent's construction is in conflict with judicial interpretation and also with departmental interpretation. (See original brief, pages 15 to 21; original brief, pages 21 to 23.)

4. The land inherited by George Pitts was turned over to him by operation of law upon the death of his wife Mamie. (See original brief, pages 23 to 29.)

5. The Circuit Court of Appeals did not construe Section 3 of the Act of February 27, 1925.

6. Section 3 of the Act of February 27, 1925, was enacted to impose restrictions upon lands taken by will by beneficiaries of one-half or more Indian blood who had not been granted certificates of competency, and the section does not reimpose restrictions against alienation upon heirs who have certificates of competency.

ARGUMENT.

The United States Has Consented to Be Bound by the State Court Action.

The respondent has cited authorities in support of the ontention that a judgment in proceedings to which the Unit-d States is not a party did not preclude the United States rom suing to enforce restrictions on Indian lands.

Those cases are not controlling in this situation. The ex-eption to the rule therein announced is that where the Unit-d States assists in the state court litigation, as it did in his instance, it does thereby consent to be bound by the re-ulting judgment.

It is not a question as to whether or not the United tates was a party to the state court litigation, and it is ot a question as to whether or not counsel appearing in the tate court litigation was authorized to represent the United tates. The question is: Did the United States by its ac-vities consent to be bound by the state court judgment?

This Court and the Circuit Court of Appeals held in he case of *United States* v. *Candelaria*, 270 U. S. 432, 70 . ed. 1023, and 16 F. (2d) 559, that the United States had onsented to be bound in that case. In that case Wilson rep-esented the Pueblo in exactly similar circumstances as Bar-ey represented George Pitts in the state court litigation n this instance.

The only distinction that can be made as to the facts is hat in the *Candelaria* case the Pueblo apparently was with-ut funds and the United States paid Wilson's attorney ee. In the present case George Pitts had funds and the nited States paid Barney from George Pitts' funds. It is

not a distinguishable difference, and the payment was only an incident in the representation as conducted by Wilson and as conducted by Barney.

The Effect of a Certificate of Competency.

In the discussion of both the Act of April 18, 1912, and the Act of February 27, 1925, the respondent endeavors to limit the effect of a certificate of competency.

As an example it is stated, page 11, that Section 7 of the 1912 Act is merely another instance in which Congress sought to protect the Indian even though he had a certificate of competency.

It never was the policy of Congress to protect the Indian with a certificate of competency after its issuance.

The Act of June 28, 1906, authorized the issuance of a certificate of competency and provided that the homestead allotment could not be alienated and that the community interest in the tribal property could not be alienated. Otherwise there was no policy of Congress to protect the Indian with the certificate of competency. He was considered by Congress to have the status of a white man and in all of the later legislation Congress distinguished between the Indian with a certificate of competency and the Indian without.

Section 7 of the Osage Act of June 28, 1906, (34 Stat. L. 539) provides that the Secretary of the Interior may issue to any adult member of the Osage Tribe a certificate of competency "if upon investigation, consideration and examination * * * he shall find any such member *fully competent and capable of transacting his or her own business and caring for his or her own individual affairs.*" Said section further provided that upon the issuance of such certificate of compe-

ency the member to whom it was issued "shall have the ight to manage, control, and dispose of his or her lands the ame as any citizen of the United States * * *." (The home-tead allotment was excepted.)

The certificate of competency issued to George Pitts on June 11, 1910, (Rec. 22, 23) stated: "Whereas upon investi-gation, consideration, and examination of the request, George Pitts has been found to be fully competent and ca-pable of transacting his own business and caring for his own individual affairs," the certificate declared that the Secrteary of the Interior does issue to George Pitts a certifi-ate of competency "and does hereby invest him with full power and authority to sell and convey any of the surplus lands deeded to him under the provisions of said Act of Congress except the minerals therein which are reserved for he use of the Osage Tribe for a period of twenty-five years rom April 8, 1906, *and does hereby declare him to be fully ompetent and capable of managing and caring for his in-ividual affairs.*"

Section 7 of the Act of April 18, 1912.

he Reasoning Concerning Section 7 of the 1912 Act:

The respondent reasons that the first clause of the first entence of Section 7 applies to the allotted lands, inherited r otherwise, and that the second clause applies to any ands, whether inherited or not; lands acquired in the course f trade or business. Then it is reasoned that full protec-ion has been afforded by the first sentence to the Indians ithout certificates of competency and that, therefore, the econd sentence must apply to Indians with certificates of ompetency or it would have no field for operation. If this s correct reasoning, it is certain that respondent has given

an erroneous interpretation to the second sentence of Section 7 for beyond doubt Congress was not thereby intending to impose permanent restrictions on the certificate member and the non-member of the tribe, but the reasoning is faulty. Section 6 fixes the status of the inherited lands in the hands of a certificate of competency member and of the non-member of the tribe. If the first sentence applies to inherited land, it definiteiy fixes the date of its alienability as of the date of the issuance of the certificate of competency.

Incidentally it seems doubtful if Congress intended by the second clause in the first sentence to impose restrictions against alienation of lands or funds which the Indian might acquire by his own labor or effort. It is more probable that Congress was legislating as to tribal property only.

Respondent attempts to reason to the conclusion that by the second sentence in Section 7 Congress was reimposing restrictions removed by Section 6 from the certificate of competency member and from the non-member of the tribe, whereas the purpose was to protect the estate of the decedent so far as necessary for the purpose of administration of the decedent's estate.

If the construction contended for by the respondent is a possible one, it still is not such construction as would conform to the intention of Congress, because:

1. It conflicts with Section 6.

2. It conflicts with the first sentence of Section 7.

3. It forever imposes one class of restrictions on property inherited by the certificate of competency Indian.

4. It forever imposes one class of restrictions on property inherited by the white heir.

5. It conflicts with the well established purpose of Congress to liberate the certificate of competency Indian.

On the other hand, if Congress intended to say that inherited lands and moneys could not be subject to or aken or sold to secure the payment of any indebtedness ne heir prior to the time such lands and funds are turned to such heirs, there is no conflict, no uncertainty, and enactment follows the general policy of the law to pro- the estate of the decedent where the administrator was led to use it to satisfy the purpose of the administra- of that estate, which was obviously the intention of gress.

Or, if Congress by the second sentence in Section 7 in- ed to impose restrictions on the inherited property of heirs, it could not have been the heirs liberated from restrictions by Section 6.

The respondent's brief reiterates the statement made he Circuit Court of Appeals, after reciting the holding he Supreme Court of Oklahoma to the effect that the ricted land of Mamie Pitts descended to her husband rge free from the possession and control of the admin- tor for the reason that the land, being restricted in nie Pitts' hands, was not subject to her debts: "This oning leads to the incongruous result that Congress in- ed to throw a greater protection around the unrestrict- ands inherited by an Osage Indian than around the re- ted land inherited by the same Indian."

The difference is that the administrator is entitled to session of the unrestricted lands of the decedent to use pay debts of the decedent and Congress wanted that pose fulfilled. The administrator is not entitled to pos- ion of the restricted land of the decedent at all and e the restricted land descends to and the title vests in heir immediately, and the heir is entitled to it immedi- y without the intervention of an administrator.

If the second sentence in Section 7 is subject to an interpretation which would reimpose restrictions removed by Section 6 from the certificate of competency member and non-member, as contended for by the United States, it is also subject to an interpretation which would prohibit the interference with the administrator of his possession and use of the property of the estate, of which he was entitled to possession, until he turned it over to the heir.

The suggested incongruity lends support to the position that Congress was endeavoring only to protect the administrator in his possession of any property of which he was entitled to possession for then there could be no incongruity.

The real incongruity comes in the attempt to place an interpretation on the second sentence in Section 7 which conflicts with Section 6 and with the first sentence in Section 7.

On pages 15 and 16 of the brief of the respondent an attempt is made to support the reasoning of the respondent by citing Congressional Acts concerning governmental regulations of Indians as a whole before the time of allotment and when the whole tribal membership was being provided for through licensed Indian traders. Certainly such situations furnish no criterion for the determination of the policy of Congress toward those Indians who years later were adjudged to be competent.

The Land Was Turned Over to George Pitts Upon the Death of His Wife, Mamie:

This point was fully presented in petitioner's original brief and the presentation here will be short.

The authorities which establish that this land was not an asset of the estate of Mamie Pitts, which was subject to

administration, are not controverted. It appears rather to be contended that the final vesting of title does not take place until the heirs have been determined.

That position is so contrary to the universal rule that the title vests immediately in the heirs upon the death of the intestate that the contention must be disregarded. It is noted that the respondent does not undertake to say who had the title, the right to possession, or ownership after the death of Mamie Pitts and until the heirs were determined.

George Pitts not only had the title but he had possession, the right to possession, and ownership from the moment of the death of his wife. There was nothing withheld from him.

Later the court determined that he had them, but no fact was held in abeyance until the court so determined. The court merely determined that those facts existed from the date of the death of Mamie Pitts, and that determination did not give George Pitts any more or additional rights. It simply enabled him to more easily establish them should anyone challenge them.

Oklahoma cases are cited to support the contention that the turning over was held in abeyance until the determination of the heirs. The cases do not support the contention but there can be no better Oklahoma authority on the question than *Pitts* v. *Drummond*, 198 Okl. 574, 118 P. (2d) 244, where the exact point was decided on the exact facts which are now before this Court. If then it is a question of interpretation of the Oklahoma law, the decision in *Pitts* v. *Drummond* is conclusive.

The fact that there might be several heirs and that the heirs might disagree cannot change the law which gives the heirs the title, ownersip and the right to immediate possession of such land upon the death of the intestate.

Section 3 of Act of February 27, 1925.
(43 Stat. L. 1008.)

The Circuit Court of Appeals Did Not Interpret:

The Circuit Court of Appeals did not pass upon the contention of respondent with reference to the interpretation of Section 3 of the Act of February 27, 1925, and, therefore, this Court reserves the right to refuse to pass upon said contention, according to the rule announced in the case of *Cities Service Oil Company* v. *Dunlap,* 308 U. S. 208, 84 L. ed. 196, and *Ensteen* v. *Simon Ascher & Co.,* 282 U. S. 455, 75 L. ed. 453.

(a) *The Meaning of a Certificate of Competency:*

In considering Section 3 of the Act of February 27, 1925, it should be borne in mind that Congress has in all legislation recognized the distinction between those Osage Indians with certificates of competency and those without.

The statutes already referred to herein show that distinction. Here are some of the others:

Section 1 of the Act of February 27, 1925, provides that each quarter there shall be paid to each adult Osage Indian of one-half or more Indian blood "having certificate of competency" his entire share of the accumulated income of the tribe, and to each adult member of the tribe, "not having a certificate of competency" certain limited amounts.

We direct attention to the language of another section of the same act:

> "*Sec. 6.* No contract for debt hereafter made with a member of the Osage Tribe of Indians not having a certificate of competency, shall have any validity, unless approved by the Secretary of the Interior. In addition to the payment of funds heretofore authorized, the Secretary of the Interior is hereby authorized in his dis-

cretion to pay, out of the funds of a member of the Osage Tribe not having a certificate of competency, any indebtedness heretofore or hereafter incurred by such member by reason of his unlawful acts of carelessness or negligence."

Note that Indians who have certificates of competency may contract. (This section was construed as applicable to Osages of less than one-half Indian blood and was later amended so as to make it inapplicable to Osages of less than one-half Indian blood.)

In other acts the intention is shown by Congress to free the certificate of competency Indians from supervision.

(b) *The Meaning of Section 3, and the Mischief to Be Remedied:*

The language of Section 3 definitely discloses no intention to reimpose restrictions on inherited land of an Osage Indian with a certificate of competency.

We quote the entire section:

"*Sec. 3.* Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians *not having certificates of competency* purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim or judgment except taxes, *or subject to alienation*, without the approval of the Secretary of the Interior."

If there is any ambiguity or confusion in the first sentence of this section, it is certainly made clear and definite by the second that there was no intention by Congress to

reimpose restrictions against alienation on lands inherited by an Indian who had a certificate of competency.

It will be remembered that by Section 6 of the 1912 Act those restrictions had been removed.

It was the decision of the Supreme Court of the United States in the case of *LaMotte* v. *United States,* 254 U. S. 570, 65 L. ed. 410, 41 S. Ct. 204, which caused the enactment by Congress of this Section 3 of the Act of February 27, 1925. In that case it was held that the restrictions against alienation on the lands of a full-blood restricted Osage Indian were removed by the execution of such Indian of a will approved by the Secretary of the Interior; that the devisees under such will took the land free of restrictions even if the devisees were restricted full-blood Indians without certificates of competency.

The United States Supreme Court reasoned that the taking under such a will was taking by purchase; that the will was an alienation, and having been approved by the Secretary of the Interior, was an alienation with the approval of the Secretary of the Interior, and consequently that the restrictions were removed from the lands in the hands of the beneficiary under the will no matter what his status.

The Interior Department sought to change that situation as to the restricted Indians and secured the enactment of Section 3 of the act.

Congress used the word "purchased" because the United States Supreme Court held that the taking under a will was taking by purchase.

That Congress did not intend to deny the right to alienate to any Indian who had a certificate of competency, no matter what his quantum of Indian blood, is made very

clear and definite by the second sentence, which says the property of Osage Indians (any Osage Indians) not having certificates of competency purchased as hereinbefore set forth (that is, taken under will or by inheritance) shall not be subject to a lien, etc., or be subject to alienation without the approval of the Secretary of the Interior.

It is by this sentence recognized by Congress that such lands in the hands of an heir or devisee, who has a certificate of competency, are subject to alienation, and the intention to leave the certificate of competency Indian free to alienate is clearly expressed.

We must look to the mischief which Congress was seeking to remedy. It was that brought about by the *LaMotte* decision which freed the willed land so that it could be alienated in the hands of a non-certificate of competency full blood Indian.

There had been no new mischief as to certificate of competency Indian. His inherited land had been freed from restrictions by the Act of Congress itself since the passage of Section 6 of the Act of April 18, 1912. The purpose not to change the law as to such Indian is clearly expressed.

It will doubtless be contended that by the use of the word "purchased" in the second sentence of Section 3 Congress intended to refer to investments for restricted Indians authorized by Section 1 of the Act, but there is no doubt but that the decision in the *LaMotte* case caused the enactment of Section 3, and in the *LaMotte* case the decision hinged on the question as to whether or not real estate taken under a will was acquired by "purchase," and the Supreme Court of the United States held it was so acquired. We think that was the reason for the use of the word "purchased" in the second sentence of Section 3. It may be no-

ticed that the investment of funds of restricted Indians authorized by Section 1 of the Act was to be in United States bonds, Oklahoma State bonds, real estate, first mortgage loans, stocks in Building & Loan Associations, livestock, deposits in the banks or in the expenditure for the benefit of the Indian. If Congress had been intending to refer to those investments in the second sentence of Section 3, it would certainly not have referred to them as "property purchased" for that general description does not fit the investments authorized.

However, it has been noticed that the second sentence in Section 3 has been given a broader meaning even by the Committee of Congress than we have attributed to it. Assuming such broader meaning is proper it is still evident that Congress by the use of the words "property purchased as hereinbefore set forth" in the second sentence was endeavoring to make clear that there should be no restrictions against inherited or devised property in the hands of an heir with a certificate of competency, for under the terms of Section 1 of the Act no investments were to be made for the Indian with a certificate of competency. He was to be paid ALL of his income and had no funds from which any kind of an investment could be made for him, and hence, there could have been no occasion for excluding the certificate of competency Indian from the operations of the second sentence of Section 3. He was already excluded by reason of the fact that the Secretary had no funds of his to invest and was not authorized to invest any of his funds.

At least this is certain—it was the obvious purpose of Congress to exclude the property of the certificate of competency Indian, whether inherited or not, from the control of the Secretary of the Interior.

It is also clear from the first sentence alone of Section 3 that it was not intended to further restrict certificate of competency Indians.

The language of the first sentence of Section 3 which gives rise to the discussion is: "Lands devised to members of one-half or more Indian blood or who do not have certificates of competency."

Now what Indians are being talked about; what Indians are to be affected? There is only one sentence. The clause beginning with the word "who" is a relative clause, beginning with a relative pronoun. By the rules of grammatical construction it is a qualifying clause, qualifying the persons or class already mentioned in the sentence.

The subject of the sentence is lands and we are trying to find out what lands are meant; the lands of whom. They are lands devised. Devised to whom? Members of the Osage Tribe of one-half or more Indian blood. Now any other qualifying description of those to whom the lands are devised cannot act otherwise than upon the class already described, namely, "members of the Osage Tribe of one-half or more Indian blood." Necessarily the "who" clause has to refer to the Indians already mentioned and no other Indians have been mentioned, except those of one-half or more Indian blood. So the language can mean nothing else except those Indians of one-half or more Indian blood, who do not have certificates of competency, and that must be true notwithstanding the fact that the confusing "or" appears before the word "who." It has to be true because there are no other Indians described to whom the "who" clause could refer.

The words "of one-half or more Indian blood" cannot be eliminated as descriptive of the Indians meant any more

than the word "Osage" could be eliminated as descriptive of the Indians meant.

Then the inevitable conclusion is that the Osage Indians of one-half or more Indian blood, who do not have certificates of competency, cannot alienate.

It then follows that the converse is equally true that those Indians of one-half or more Indian blood, who do have certificates of competency, may alienate.

We also call attention to the fact that there is no attempt by the language used in this Section 3 or of the entire Act of February 27, 1925, to repeal or amend Section 6 of the Act of April 18, 1912, which so specifically and definitely removed the restrictions against alienation of the heir who had received a certificate of competency.

(c) ***The Holding of Judge Kennamer in United States v. Johnson, 29 Fed. Supp. 300, Does Not Support the Appellant's Contention:***

The only question which Judge KENNAMER had for decision, which is of interest here, is whether or not Section 3 of the Act of 1925 applied to John Holloway, a less than one-half blood Indian without a certificate of competency, the contention being made in behalf of Johnson was that as John Holloway was less than one-half blood Indian the section did not apply.

Judge KENNAMER decided that it did apply to all Osages whether one-half blood or more or less than one-half blood. Then by inference he decided that the only thing which would have prevented the application of the section would have been the granting to the heir of a certificate of competency.

In the case at bar George Pitts was granted a certifi-

cate of competency which placed him in a status not covered by the opinion in the *Johnson* case.

It is contended that the reasoning in the *Johnson* opinion is such that it leads to the conclusion that Judge KENNAMER meant to say that, "if the heirs were full-bloods, they could not alienate, even if they had been granted a certificate of competency." Judge KENNAMER says that the section covered two classes:

First, members of the tribe of one-half or more Indian blood;

Second, members of the tribe who do not nave certificates of competency.

Respondent concludes from that statement that Indians of one-half or more Indian blood cannot convey, even if they have certificates of competency.

Note his general statement early in the opinion:

> "None of the Indians involved in this cause were or have ever been issued a certificate of competency."

Appearing, as this statement does, at the outset of the opinion, it shows that he was eliminating the certificate of competency question from his consideration.

If he had in mind that the full-bloods could not alienate, even if they had certificates of competency, he need not have mentioned the certificates of competency in connection with any Indian except John Holloway, for all other Indians involved were full-bloods.

It is quite notable, too, that Judge KENNAMER calls attention to Section 6 of the Act of April 18, 1912, and states that when the heirs of deceased allottees have certificates of competency "the restrictions on alienation were removed."

This is the language used:

> "The Act of April 18, 1912, 37 Stat. 86, authorized the partition of restricted lands of deceased allottees, subject to the approval of the Secretary of the Interior, and declared that when the heirs of deceased allottees have certificates of competency, or are not members of the tribe, *the restrictions on alienation were removed.*"

Therefore the opinion holds clearly and definitely that when the heir has a certificate of competency the restrictions are removed which we are certain establishes that there was no intention on the part of Judge KENNAMER to hold or to state that the land was restricted in the hands of an heir who had a certificate of competency.

Also please observe that in paragraph numbered 3 of the opinion, attention is called to the fact that the heirs of Sin-tsa-wah-kon-tah, to whom the land first descended, "did not have certificates of competency," clearly implying that, if they had had, the restrictions against alienation would have been removed.

Then again in the same paragraph is this sentence: "The last two are unallotted Indians, born since July 1st, 1907, and neither has a certificate of competency."

Here again is a clear indication that the writer of the opinion has kept definitely in mind the distinction between heirs with certificates of competency and heirs without certificates of competency.

It is again made very evident that Judge KENNAMER was not attempting to decide that the certificate of competency did not give the right to alienate by the fact that the second sentence in Section 3 of the Act of 1925 was not quoted or ever mentioned in his opinion. As the second sentence so clearly states that the intention to impose no restrictions upon any Indian with a certificate of competency,

it is very evident that Judge KENNAMER would not have overlooked this sentence had there been any intention in his mind of holding that the certificate of competency did not give the right to convey. Judge KENNAMER not only throughout his opinion assumes that the Indian with the certificate of competency may alienate, but he states it and calls attention to Section 6 of the 1912 Act and says that restrictions are removed by it when a certificate of competency has been granted.

If there could be any doubt from this *Johnson* opinion as to Judge KENNAMER's holding concerning the certificate of competency Indian, that doubt is entirely removed by his holding in the case of *United States* v. *Howard,* 8 Fed. Supp. 617.

In that case two full-blood restricted Osage Indians, each without a certificate of competency, had inherited lands from a full-blood restricted Osage Indian without a certificate of competency. The two heirs then partitioned the land and the sheriff's deed in the partition action were approved by the Secretary of the Interior. Judge KENNAMER held that the approval of the sheriff's partition deeds to those two heirs by the Secretary of the Interior had removed their restrictions against alienation but that by Section 3 of the Act of February 27, 1925, here under consideration, the restrictions were reimposed upon those full-blood Indian heirs without certificates of competency, they having inherited the land.

In his opinion, however, he very clearly holds that Section 3 does not reimpose restrictions upon Indians who have certificates of competency.

We quote the third syllabus to the case of *United States* v. *Howard,* 8 Fed. Supp. 617:

"*3.* Restrictions against alienation upon land members of the Osage Tribe of Indians, which was quired by *incompetent heirs,* by inheritance, altho restrictions were removed by manner of acquisit through partition proceedings, held reimposed by l statute placing restrictions upon lands devised or herited by members of tribe *without certificate of c petency,* so that conveyance by such heirs, made a enactment of statute, were void. (St. Okl. 1931, 1614, *et seq.;* Act April 18, 1912, 37 Stat. 86, Sec Act Feb. 27, 1925, Sec. 3; 25 U. S. C. A., Sec. note)."

Note that in the opinion it is stated that Wah-hrah-l pah, the original Osage allottee, was a full-blood restri Indian who died "*without having a certificate of com tency,*" and that the lands descended to her *two daught Patricia Butler and Grace En-to-kah Abbott,* both full-bl Osage allottees "*who have not been granted certificate competency.*"

Then the holding is that the partition action betw those two heirs approved by the Secretary of the Inte removed the restrictions against alienation, but that Sec 3 of the Act of Congress of February 27, 1925, reimpo the restrictions against alienation and in discussing tion 3 this language is used:

"A reading of the act discloses that its purpos to protect the *incompetent* Osage allottees * * *."

Quoting further from the opinion:

"It clearly appears that the lands devised to m bers of the tribe *without certificates of competency* the lands inherited by such Indians were inalienab

And quoting further from the opinion, p. 619:

"The purpose of the act plainly appears from

language employed in it; it undertook to reimpose restrictions upon all property whether inherited by or purchased for *incompetent* members of the tribe. In the instant case, the property involved came first by inheritance and then, by reason of the partition proceedings, the estate was changed to that of purchase; in my opinion the purpose and language of the act is sufficiently broad to include the lands in question.

"I am of the opinion that the 1925 Act of Congress reimposed restrictions upon all lands of *incompetent Osage allottees,* such restrictions were reimposed by Section 3 of the Act of Congress of February 27, 1925. All such lands were restricted at the date of the conveyances, restrictions having been reimposed such conveyances are void."

It is felt that, if it had not been for the statement in the *Johnson* opinion that Section 3 covers two classes of Indians, there never would have been a contention by any one that Section 3 reimposed restrictions upon an Indian with a certificate of competency.

It is, therefore, thought to be desirable to indulge in further reasoning concerning the *Johnson* opinion and concerning the possible construction of Section 3. We do, however, wish not to be misunderstood when indulging in that discussion. We take this position definitely: That the *Johnson* opinion cannot be construed as holding that restrictions were imposed upon the inherited land of an Indian who had a certificate of competency because of the deliberate and obvious exclusion of that question from the opinion.

Then it is unimportant from the standpoint of the decision here whether or not the reasoning in the *Johnson* opinion is correct, for whether the opinion is right or wrong it does not support the position of the government for the

certificate of competency question is excluded from the scope of the opinion.

It is our opinion, however, that the reasoning in the *Johnson* opinion cannot be supported and that the conclusion therein reached is wrong.

There is only one class of members of the Osage Tribe mentioned in Section 3, namely, those of one-half or more Indian blood. How are we going to get any other Indians involved in the sentence? No other Indians are mentioned. We cannot just voluntarily put them in. It is only members of the tribe of one-half or more Indian blood who are involved. The sentence does not permit the adding of other Indians by implication. The "who" clause has to qualify some one and we cannot arbitrarily strike out "of one-half or more Indian blood" any more than we can strike out "of the Osage Tribe." They are both prepositional phrases and both modify the noun "members." From a recent reexamination of a grammer we learn that a prepositional phrase either modifies a noun or a verb and that when it modifies a noun it operates exactly as an adjective. In this instance it modifies the noun "members" so that the prepositional phrase "of the Osage Tribe" and the prepositional phrase "of one-half or more Indian blood" are each in effect adjectives modifying "members."

Now the relative "who" clause, as we have already pointed out, can refer to no one else except the members already mentioned qualified by the two prepositional phrases "of the Osage Tribe," and, "of one-half or more Indian blood." Apparently what counsel is asking this court to do is to hold that the relative clause qualifies the word "members" modified by the prepositional phrase "of the Osage Tribe," but then insists that the other prepositional phrase

which modifies the word "members" in exactly the same manner should be entirely ignored or overlooked by the court.

The less than one-half blood Indians are nowhere mentioned in the sentence or in the entire section. To include the less than one-half blood Indians it is essential that the words "of one-half or more Indian blood" be stricken out or ignored, and to say that the legislation refers to all members of the tribe. This cannot be done or said because the words are there. There is no conceivable way of enlarging the number of classes or kind of Indians meant without complete elimination of the prepositional phrase "of one-half or more Indian blood."

Now let us assume that the reasoning in the *Johnson* opinion is correct and that there were two classes of Indians affected; *first,* those of one-half or more Indian blood, and, *second,* those who had not been granted certificates of competency.

It cannot be said that the second class does not include the first class. Why? Because the only way you can include the unmentioned less than one-half blood Indians at all is by including ALL Osage Indians or ALL members of the Osage Tribe and ignore the words "of one-half or more Indian blood." In other words, if the second class includes the less than one-half blood Indians, the reference must be to ALL members of the Osage Tribe which has to include those of one-half or more Indian blood as well as those of less than one-half Indian blood. In still other words, you must say that the "who" clause refers to "members of the Osage Tribe," which includes ALL of them.

All right, by including "one-half blood or more" in the second class mentioned in the opinion, you have concluded

that Congress intended to eliminate the certificate of competency Indian no matter what his quantum of blood from the purview of the act.

The reasoning that Congress so intended is made insurmountable by the consistent policy of Congress to allow the Indian, who has been determined to be competent, to handle his own affairs, and by the provisions of the second sentence in Section 3 which so clearly states that it is only the Indian without the certificate of competency who cannot alienate, and also by the opinion in the *Johnson* case which clearly states that the granting of a certificate of competency removes the restriction against alienation.

It seems to us clear that there is only one class of Indians mentioned in the sentence, that is, those Indians of one-half or more Indian blood, and only those who do not have certificates of competency.

If it had been the intention of Congress to have divided the Indians into classes, it would have been necessary to have used the word "either" in connection with the word "or," that is, either those Indians who are of one-half or more Indian blood or those Indians who do not have certificates of competency. Even then it would not have been such legislation as Congress would have enacted because there would have been overlapping in the groups.

Probably the whole trouble is occasioned by a simple error in transcribing, which was not caught by anyone, but there are other more logical conclusions to be drawn from the actual language than that drawn in the *Johnson* opinion, even if the intention of Congress, and all other Osage legislation, should be ignored.

In the *Johnson* opinion the contention that "or" should be construed as "and" was rejected, but Judge KENNAMER

has himself applied that rule of construction in other cases. In Words & Phrases, when the word "or" is being defined, literally scores of instances are cited where it is proper to construe "or" as "and."

Should it still be felt that it is necessary to explain the word "or" it might be noted that it is used in connection with these other words "or who do not." The words "or do not" mean "unless" or "except." Then we have a sentence looking like this: "Lands devised to members of the Osage Tribe of one-half or more Indian blood, unless they are those who have certificates of competency, shall be inalienable." The sentence might be constructed like this: "Lands devised to members of the Osage Tribe of one-half or more Indian blood, except those who have certificates of competency, etc." The qualifying clause might be in this language: "Except who have certificates of competency."

The word "or" construed with the word "not" makes an exception to the statement which it modifies.

It occurs to us that any of those explanations for the use of the word "or" are more logical than the explanation given in the *Johnson* opinion, and would be in accord with the purpose and intention of Congress.

(d) *The Congressional Committee Report:*

The Committee on Indian Affairs of the House of Representatives of the United States on March 5, 1924, made a report to the House concerning the bill which was enacted into law, being the Osage Act of February 27, 1925, under discussion here. In that report this is said:

> "*Section 3.* This section provides that lands devised by will, approved by the Secretary of the Interior, and lands belonging to *incompetent* allottees shall not

be alienated without the consent of the Secretary of the Interior, thus preventing the *incompetent* Indians from disposing of the land so received without adequate consideration."

This committee of Congress unquestionably thought that Section 3 means exactly what we contend it means, that it did not prevent a *"competent" Indian*, that is, an Indian with a certificate of competency, from alienating his inherited land.

Conclusion.

May it be suggested that the interpretation sought by the respondent is not supported by authority, precedent, or logic and is contrary to both Congressional and Departmental interpretation, and that for the reasons herein set out the decision of the Circuit Court of Appeals should be reversed.

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INDEX

CITATIONS

614644—41

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 520

FRED G. DRUMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. Its findings of facts, conclusions of law, and judgment appear in the record at pages 54–59. The opinion of the circuit court of appeals (R. 85–90) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on August 1, 1944 (R. 90–91). The petition for rehearing was denied on August 28, 1944 (R. 119). The petition for a writ of cer-

tiorari was filed on September 30, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a decree of a state court, ordering foreclosure of a mortgage executed by an Osage Indian and entered in a proceeding to which the United States was not a party, is a bar to this suit by the United States to have the mortgage declared invalid and title to the land quieted in the Indian.

2. Whether a mortgage on land inherited by an Osage allottee, who had a certificate of competency, from a full-blood Osage allottee, to whom no certificate of competency had ever been issued, is invalid under Section 7 of the Act of April 18, 1912, because executed prior to adjudication of heirship and issuance of the order distributing the estate to the heir in proceedings for the probate of the deceased allottee's estate.

STATUTES INVOLVED

Sections 3, 6, and 7 of the Act of April 18, 1912, 37 Stat. 86, provide, in part, as follows:

> SEC. 3. That the property of deceased * * * allottees of the Osage Tribe * * * shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma * * *

SEC. 6. * * * When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. * * *

SEC. 7. That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: * * *

STATEMENT

Mamie Fletcher Pitts, a full-blood Osage allottee, to whom no certificate of competency had been issued, died May 24, 1937, seized of land which had been allotted to her as a member of the Osage Tribe of Indians (R. 54). In proceedings for the probate of her estate duly instituted in the County Court of Osage County, Oklahoma, George Pitts, her husband, also a full-blood Osage allottee, was appointed administrator of her estate (R. 55). On July 12, 1937, he mortgaged the

land involved to Fred G. Drummond as security for the payment of a note for $2,500.00, the mortgage being made without the approval of the Secretary of the Interior (R. 56). On June 24, 1938, the Secretary of the Interior revoked a certificate of competency which had been issued to George Pitts on July 11, 1910 (R. 55). On September 9, 1938, the County Court of Osage County entered its order adjudging George Pitts to be the sole heir of Mamie Pitts and directing the distribution of her estate to him (R. 55).

On October 24, 1939, Fred G. Drummond instituted an action against George Pitts in the District Court of Osage County to recover judgment on the note and for foreclosure of the mortgage. On February 9, 1940, a judgment foreclosing the mortgage was entered in that court in favor of Drummond. On May 6, 1941, the judgment was affirmed by the Supreme Court of Oklahoma. *Pitts* v. *Drummond,* 189 Okla. 574. On March 2, 1942, a petition for a writ of certiorari was denied by the Supreme Court of the United States. 315 U. S. 814. In this litigation, George Pitts was represented by a private attorney whose employment was approved by the Secretary of the Interior. The appeal to the Supreme Court of Oklahoma, the necessary supersedeas bond, and the consequent petition for certiorari to the Supreme Court of the United States were authorized and approved by the Secretary who likewise authorized

and approved the payment of the expenses of the litigation from the funds of George Pitts held by the Osage Indian Agency. The United States was not a party to this litigation, nor was the Indian's counsel authorized to appear for or represent the United States. (R. 56–57.)

On April 29, 1942, the United States brought this action on its own behalf and on behalf of George Pitts to cancel the mortgage and to quiet his title to the land involved, alleging that the mortgage was void under Section 7 of the Act of April 18, 1912, because made prior to the order of the probate court adjudging George Pitts to be the heir of Mamie Pitts and directing the distribution of her estate to him (R. 1–10). On September 4, 1943, the district court entered judgment in favor of Fred G. Drummond (R. 59). On August 1, 1944, the circuit court of appeals reversed the judgment (R. 90–91).

ARGUMENT

1. Both courts below properly rejected petitioner's contention (Br. 40–45) that the United States is bound by the state court adjudications in the foreclosure proceedings (R. 57, 86, 116, 119). *Bowling* v. *United States,* 233 U. S. 528; *Logan* v. *United States;* 58 F. (2d) 697 (C. C. A. 10); cf. *United States* v. *Hellard,* No. 648, October Term 1943. The United States was not a party to that proceeding, nor was it represented in any way.

The approval and authorization by the Secretary of the Interior of the various steps in the litigation was sought, by counsel chosen by Pitts, and granted (R. 53–54) only to insure payment of the expenses out of George Pitts' restricted funds in the hands of the Osage Indian Agency.[1]

2. Petitioner contends (Br. 15–21) that since George Pitts had a certificate of competency, Section 6 of the 1912 Act removed restrictions on alienation from the allotment he inherited from Mamie Pitts, and hence Section 7 of the 1912 Act is inapplicable to the mortgage here involved. In advancing this contention, petitioner seeks to draw support from *United States* v. *Mullendore*, 30 F. Supp. 13 (N. D. Okla.). But the *Mullendore* case involved a non-Osage heir, and in holding that Section 7 of the 1912 Act does not impose restrictions on land inherited by a non-Osage, the court said that the 1912 Act as a whole discloses "a purpose to protect Osage allottees and

[1] The purpose of petitioner's reference (Br. 12–13) to Section 4 of the Act of February 27, 1925, 43 Stat. 1008, 1011, and *United States* v. *Sands*, 94 F. (2d) 156 (C. C. A. 10), decided thereunder, is far from clear. If that Act imposes any obligation on the Secretary of the Interior, under the circumstances of this case, to pay George Pitts' "just indebtedness * * * out of the income of such member, in addition to the quarterly income hereinbefore provided for," that obligation has no relation to the ruling of the court below that the mortgage foreclosed by petitioner was invalid. We are informed, moreover, that there is no income of George Pitts from which a payment directed by Section 4 could be made.

their Osage Indian heirs" but "no policy for the protection of non-members of the tribe". 30 F. Supp. at 15.

Petitioner's view is supported by *Pitts* v. *Drummond,* 189 Okla. 574, certiorari denied, 315 U. S. 814, in which the court held the mortgage here involved to be valid, but the Oklahoma court relied, in part, on the *Mullendore* case which, as we have shown, is distinguishable. It is further contended (Br. 23–34) that, since title and the right of immediate possession of Mamie Pitts' allotment devolved on George Pitts immediately upon Mamie's death, Section 7 does not apply because there is no occasion for possession of her allotment to be "turned over" to George Pitts by a probate court or administrator. This was one ground of the *Pitts* v. *Drummond* decision, *supra,* and the basis of the district court's decision herein. Both of these contentions are unsound and were properly rejected by the circuit court of appeals.

Respective fields of operation are assigned by the decision below to Sections 6 and 7 of the 1912 Act. While the former section removes restrictions on alienation from lands inherited by Osage Indians who have certificates of competency, the latter affords such Indians full protection against certain obligations, incurred during the period the land was restricted and for a limited time thereafter, which would otherwise be enforceable against their lands. The first sentence of Section 7 protects the lands, both allotted and

inherited, of Indians who receive certificates of competency, from forced sales in satisfaction of obligations incurred prior to the issuance of the certificates of competency; and the second sentence applies to the inherited lands of Indians who have certificates of competency, and prevents the taking of such lands to secure "the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs." Unless applicable to Indians who hold certificates of competency, the second sentence of Section 7 would be meaningless, for restricted Indians, of course, require no such protection. Rejection of petitioner's construction (Br. 31) of this sentence, which would limit its application to a prohibition against taking the lands while they are in the hands of the administrator, requires no more than a careful reading of the sentence. It is not only provided that the lands and money shall not be "taken or sold" for indebtedness incurred before they are "turned over" but also that they shall not be "subject to" such indebtedness.

The class of creditors from whom the second sentence protects the inherited lands of Osages who have certificates of competency becomes clear if the words "turned over" are construed, as they should be, in connection with Section 3 of the 1912 Act, which provides that: "The property of deceased * * * allottees of the Osage Tribe * * * shall, in probate matters, be subject to

the jurisdiction of the county courts of the State of Oklahoma." As the Oklahoma Supreme Court indicated in *Pitts* v. *Drummond,* 189 Okla. 574, 576, certiorari denied, 315 U. S. 814, while title to lands passes immediately on the death of an allottee to his heirs, the title of the heirs does not become absolute until the probate court has exercised its jurisdiction. *White House Lumber Co.* v. *Howard,* 142 Okla. 163; *Oil Well Supply Company* v. *Cremin,* 143 Okla. 57. Accordingly, estates of deceased allottees may reasonably be said to be "turned over" to the heirs, within the meaning of Section 7 once the probate court has determined the heirs and ordered distribution of the property to them. It would be absurd to construe the words "turned over" of the second sentence of Section 7 as having reference to the time the heir obtains the right of immediate possession. As the circuit court of appeals noted (R. 87), such a construction would mean that Congress intended to protect the unrestricted property of deceased allottees but not their restricted property which always descends, with the absolute right of immediate possession, immediately to the heirs. Moreover, the statute supplies no basis for such a construction but, on the contrary, argues against it. Section 7 of the 1912 Act does not deal in terms of possession. In substance, it provides that certain indebtedness may not affect the ownership by Osage heirs of inherited land. Therefore,

it is logical to suppose that the statute is concerned with the time when ownership, not possession, is "turned over."

CONCLUSION

This case was correctly decided by the circuit court of appeals. Although there is a conflict between the decision below and that of the Oklahoma Supreme Court in *Pitts* v. *Drummond,* 189 Okla. 574, certiorari denied, 315 U. S. 814, we submit that since the problem involved in these cases is localized and confined to the Osage Indians, and since the ruling of the court below on the construction of the federal statute will probably be regarded as controlling in state as well as federal courts, the petition for a writ of certiorari should be denied.

Respectfully,

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OCTOBER 1944.

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INDEX

CITATIONS

628468—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 520

FRED G. DRUMMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court did not write an opinion. Its findings of fact, conclusions of law, and judgment appear in the record at pages 52–57. The opinion of the Circuit Court of Appeals (R. 79–84) is reported at 144 F. (2d) 375.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 1, 1944 (R. 84). The petition for rehearing was denied on August 28, 1944 (R. 84). The petition for a writ of certio-

rari was filed on September 30, 1944, and was granted on November 13, 1944 (R. 85). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a decree of a state court, ordering foreclosure of a mortgage executed by an Osage Indian and entered in a proceeding to which the United States was not a party, is a bar to this suit by the United States to have the mortgage declared invalid and title to the land quieted in the Indian.

2. Whether a mortgage on land inherited by an Osage allottee, who had a certificate of competency, from an Osage allottee to whom no certificate of competency had ever been issued, is invalid under the second sentence of Section 7 of the Act of April 18, 1912, because executed prior to the probate court's adjudication of heirship and issuance of an order distributing the estate to the heir.

3. Whether, the mortgagor being an Osage allottee of one-half or more Indian blood and the mortgage not having been approved by the Secretary of the Interior, the mortgage is invalid under Section 3 of the Act of February 27, 1925.

STATUTES INVOLVED

Sections 3, 6 and 7 of the Act of April 18, 1912, 37 Stat. 86, and Section 3 of the Act of February

27, 1925, 43 Stat. 1008, are set forth in the Appendix, *infra*, pp. 22–25.

STATEMENT

Mamie Fletcher Pitts, a full-blood Osage allottee, to whom no certificate of competency had been issued, died May 24, 1937, seized of land which had been allotted to her as a member of the Osage Tribe of Indians (R. 52). In proceedings for the probate of her estate duly instituted in the County Court of Osage County, Oklahoma, George Pitts, her husband, also a full-blood Osage allottee, was appointed administrator of her estate (R. 53). Pending conclusion of the administration proceedings the Osage Indian Agency looked after the lands under agricultural leases executed by Pitts as administrator (R. 53). On July 12, 1937, Pitts mortgaged the land involved to Fred G. Drummond as security for the payment of a note for $2,500.00, the mortgage being made without the approval of the Secretary of the Interior (R. 54). On June 24, 1938, the Secretary of the Interior revoked a certificate of competency which had been issued to George Pitts on July 11, 1910 (R. 53). On September 9, 1938, the County Court of Osage County entered its order adjudging George Pitts to be the sole heir of Mamie Pitts and directing the distribution of her estate to him (R. 53).

On October 24, 1939, Fred G. Drummond instituted an action against George Pitts in the Dis-

trict Court of Osage County to recover judgment on the note and for foreclosure of the mortgage. On February 9, 1940, a judgment foreclosing the mortgage was entered in that court in favor of Drummond. On May 6, 1941, the judgment was affirmed by the Supreme Court of Oklahoma. *Pitts* v. *Drummond,* 189 Okla. 574. On March 2, 1942, a petition for a writ of certiorari was denied by the Supreme Court of the United States. 315 U. S. 814. In that litigation, George Pitts was represented by a private attorney whose employment was approved by the Secretary of the Interior. The appeal to the Supreme Court of Oklahoma, the necessary supersedeas bond, and the petition for certiorari to the Supreme Court of the United States were authorized and approved by the Secretary who likewise authorized and approved the payment of the expenses of the litigation from the funds of George Pitts held by the Osage Indian Agency. The United States was not a party to this litigation, nor was counsel for the Indian authorized to appear for or represent the United States (R. 54–55).

On April 29, 1942, the United States brought this action on its own behalf and on behalf of George Pitts to cancel the mortgage and to quiet his title to the land involved (R. 1–9). On September 4, 1943, the District Court entered judgment in favor of Fred G. Drummond (R. 57). On August 1, 1944, the Circuit Court of Appeals reversed the judgment (R. 84).

SUMMARY OF ARGUMENT

1. The state court judgment in the foreclosure proceedings is not a bar to this suit. The United States was not a party to the foreclosure proceedings nor was it represented in any way. The approval and authorization by the Secretary of the Interior of the various steps in the state court litigation were sought by counsel chosen by Pitts and were granted (R. 54–55) only to permit payment of fees and expenses out of George Pitts' restricted funds in the hands of the Osage Agency.

2. The Circuit Court of Appeals correctly construed the second sentence of Section 7 of the Act of April 18, 1912, as rendering invalid a mortgage on lands inherited from a deceased Osage allottee, made by an Osage heir possessing a certificate of competency prior to the order of the probate court determining heirs and distributing the estate of the deceased allottee. That sentence makes no exception of Osage heirs who have certificates of competency and who alone are in need of its protection. Although it is true that Section 6 of the same Act permits such Indians to alienate their inherited lands, Section 7 protects the lands against liability for debts incurred before the issuance of certificates of competency or prior to the time when the lands are "turned over" to the heirs. The second sentence of Section 7 applies to the restricted lands of deceased Osage allottees. It would be irrational to suppose that Congress

intended to protect heirs with regard to the unrestricted lands but not with regard to the restricted lands. Restricted lands, although not coming under the control of the county court as assets for the payment of debts of the decedent, are the subject of determinations of heirship and orders of distribution. The title to land does not vest finally and irrevocably in the heir holding a certificate of competency until such an order is made. At that point the property is "turned over" to such heir within the meaning of the statute.

3. This construction of Section 7 of the Act of 1912 disposes of the case. In any event, Section 3 of the Act of February 27, 1925 provides that lands inherited by Osage Indians "of one-half or more Indian blood or who do not have certificates of competency" shall be inalienable except with the approval of the Secretary of the Interior. The mortgage is invalid if this provision is applicable to Osage Indians of one-half or more Indian blood who have certificates of competency. By its terms the statute applies. Although this construction causes Section 3 to continue the restrictions on the lands inherited by George Pitts from his wife, a restricted Osage, and thus causes Section 6 of the Act of April 18, 1912, *supra,* to be, in part, inoperative, that Section continues to apply to Indians of less than one-half Indian blood who have certificates of competency. In view of the clear wording of Section 3, the legis-

lative history, which refers to the statute as intended for the protection of incompetent Indians, should not be regarded as controlling.

ARGUMENT

I

THE STATE FORECLOSURE PROCEEDING IS NOT A BAR TO THIS SUIT

Both courts below properly rejected petitioner's contention (Br. in support of petition, 40–45) that the state court judgment is a bar to this suit (R. 55, 79). Judgments in proceedings to which the United States is not a party do not preclude it from suing to enforce restrictions on Indian lands. *Bowling* v. *United States,* 233 U. S. 528, 534–535; *Privett* v. *United States,* 256 U. S. 201, 203; *Sunderland* v. *United States,* 266 U. S. 226, 232; *Logan* v. *United States,* 58 F. (2d) 697 (C. C. A. 10); cf. *United States* v. *Hellard,* 322 U. S. 363. Contrary to petitioner's view, validity as against the United States does not attach to the state judgment here involved merely because the Secretary of the Interior authorized Pitts' employment of counsel and the various steps in the litigation (R. 54–55). His approval and authorization were sought by counsel chosen by Pitts and were granted only to permit payment of fees and expenses out of Pitts' restricted funds. See Section 6 of the Act of February 27, 1925, c. 359, 43 Stat., 1008, 1001. Except

that Pitts might have been financially unable to defend the suit but for the Secretary's approval and authorization, the control and conduct of the state litigation rested entirely with Pitts. The United States did not participate in the litigation or attempt in any way to aid Pitts in his defense. Since this case in fact presents no question of United States' aid to Pitts in conducting the state litigation, the doctrine of *Heckman* v. *United States*, 224 U. S. 413, 446, and *United States* v. *Candelaria*, 271 U. S. 432, 444, upon which petitioner relies (Br. in support of petition, 42–44), is not involved.[1]

II

THE MORTGAGE INVOLVED IS INVALID UNDER THE SECOND SENTENCE OF SECTION 7 OF THE ACT OF APRIL 18, 1912, 37 STAT. 86

The provision in question reads as follows:[2]

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[1] The purpose of petitioner's reference (Br. in support of petition, 12–13) to Section 4 of the Act of February 27, 1925, 43 Stat. 1008, 1010, and *United States* v. *Sands*, 94 F. (2d) 156 (C. C. A. 10), is far from clear. If that Act imposes any obligation on the Secretary of the Interior, under the circumstances of this case, to pay George Pitts' "just indebtedness * * * out of the income of such member, in addition to the quarterly income hereinbefore provided for," that obligation has no relation to the ruling of the court below that the mortgage foreclosed by petitioner was invalid. We are informed, moreover, that there is no income of George Pitts from which a payment directed by Section 4 could be made.

[2] The full text of Section 7 appears in the Appendix, *infra*, pp. 24–25.

> That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs * * *.

The Circuit Court of Appeals construed the provision as applicable to an Osage heir who has a certificate of competency; and it construed the words "turned over" as having reference to the action of the probate court in determining heirship and distributing the estate. The Supreme Court of Oklahoma held in the previous litigation referred to *supra,* pp. 3–4, that this sentence did not make the mortgage invalid. Its view was that the provision is not applicable (1) to an Osage heir who has a certificate of competency, or (2) to restricted lands of deceased Osage allottees. *Pitts* v. *Drummond,* 189 Okla. 574, certiorari denied, 315 U. S. 814. Its view was that Osage heirs who have certificates of competency are within a larger class of heirs, including also any who are not members of the Osage Tribe, the freedom of whose inherited lands from restrictions by virtue of Section 6 of the 1912 Act precludes the applicability of the exemption in question here. The relevant provision of that Section is:[3]

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[3] The full text of Section 6 is set forth in the Appendix, *infra,* pp. 23–24.

> When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.[4]

The Oklahoma court also regarded the provision of Section 7 as inapplicable to restricted lands of deceased Osage allottees because such lands are not assets in the hands of an administrator for the payment of debts; are not subject to his control; and, hence, are not "turned over" to the heirs by anyone. In sustaining the validity of the mortgage, the District Court in the present proceeding rejected the first ground of the decision in *Pitts* v. *Drummond, supra,* but adopted the second (R. 55–56). Petitioner relies on both grounds

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[4] Under this provision, the heirs specified are free to alienate lands inherited from deceased allottees. *Kenny* v. *Miles*, 250 U. S. 58, 63; *La Motte* v. *United States*, 254 U. S. 570, 580–581; Opinion of Preston C. West, Assistant Attorney General, dated March 23, 1914 (copies filed in the office of the Clerk).

In holding, in view of Section 6 of the 1912 Act, that the second sentence of Section 7 of that Act was inapplicable to Osage heirs who have certificates of competency, the Supreme Court of Oklahoma relied on *United States* v. *Mullendore*, 30 F. Supp. 13 (N. D. Okla.). That was a case in which it was held that the second sentence of Section 7 of the 1912 Act does not apply to non-Osage heirs because the 1912 Act as a whole discloses "a purpose to protect Osage allottees and their Osage Indian heirs" but "no policy for the protection of non-members of the tribe." 30 F. Supp. at p. 15. Cf. *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432. In its opinion, however, the court expressed the view that the second sentence of Section 7 of the 1912 Act has no application to the classes of heirs dealt with in Section 6 of that Act.

of that decision (Pet. & Br. in support of petition 15–40).

The Circuit Court of Appeals, we think, decided the question correctly. Under the Osage Allotment Act of 1906, a certificate of competency had but limited effect. It removed restrictions from the surplus allotment of the member only, Sec. 2, Seventh, of the Act of June 28, 1906 (34 Stat. 539, 542), leaving the homestead and such restricted lands as the member might inherit subject to the existing restrictions against alienation. We submit that Section 7 is merely another instance in which Congress sought to protect an Indian even though he held a certificate of competency. It is in no way inconsistent with Section 6 of the same (1912) Act.

The protection extended by Section 7 embraces members of the tribe having certificates of competency. The first sentence of that section protects all lands and funds from being taken in satisfaction of any debt, obligation, or claim incurred during the restricted period, i. e., prior to removal of restrictions or the issuance of a certificate of competency. The first clause of the first sentence of Section 7 operates on allotted lands only while the second clause of that sentence embraces all lands and funds of tribal members without qualification. The two clauses of the first sentence thus protect all lands and funds, including lands and funds acquired by inheritance, from indebtedness incurred by tribal members be-

fore the issuance of a certificate of competency or the removal of restrictions. Under this view, full protection is given by the first sentence of Section 7 to all lands and funds of tribal members not having certificates of competency when the debt was incurred whether the lands and funds accrue to the members in their own right as members of the tribe or by inheritance from deceased members. Accordingly, no effect can be given to the second sentence of Section 7 unless it be held to apply to the inherited lands and funds of members having certificates of competency and to prevent the taking of such lands and funds to secure "the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs", for the provision is unnecessary as regards restricted Indians who receive the protection of other provisions of law. It is the purpose of the second sentence to secure the property intact to the heirs as of the time it is "turned over."[5]

It is equally evident that restricted lands of deceased Osage allottees fall within the second sentence of Section 7 of the 1912 Act. The statute does not exclude restricted lands and, as

[5] It is obvious that the land and moneys are "turned over" when the estate is distributed after the identity of the heirs has been determined: Originally, the term "paid" was used but, as this expression was inappropriate when applied to land, the phrase "turned over" was substituted. See 48 Cong. Rec. 4252, 4253, 4263.

the Circuit Court of Appeals said (R. 80), it would be incongruous to conclude that Congress intended to protect unrestricted lands inherited from deceased Osage allottees but not restricted lands similarly inherited, often by the same heirs. The view which would exclude restricted lands is based upon federal statutes which cause the lands to be "free from any of * * * [the decedent's] obligations" and hence, it is said, free of the control of the administrator, which extends only to property available for the payment of debts. *Pitts* v. *Drummond, supra,* at p. 576. Upon the death of the allottee, the title to such lands passes immediately to the heirs. See the opinion of the court below, at R. 83. It does not follow, however, that the lands are not "turned over" by the court to the heir. We contend that they are and that they come within the statutory provision as fully as any other property.

Section 3 of the 1912 Act (Appendix, *infra,* pp. 22–23) provides that: "The property of deceased * * * allottees of the Osage Tribe * * * shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma." The local probate (i. e., county) courts are thereby invested with jurisdiction to determine heirship and to distribute the property of deceased Osage allottees. *Globe Indemnity Co.* v. *Bruce,* 81 F. (2d) 143 (C. C. A. 10); *Mudd* v. *Perry,* 25 F. (2d) 85 (C. C. A. 8); *In re Thompson's Estate,* 179 Okla. 240; opinion of the court below at R.

82. This jurisdiction is not dependent upon the existence of assets subject to payment of the decedent's debts. *Wolf* v. *Gills,* 96 Okla. 6; *In re Thompson's Estate,* 179 Okla. 240; *Hardridge* v. *Hardridge,* 168 Okla. 7. It is as complete in the case of the restricted property of deceased Osage allottees as in the case of the statutory homestead of a white decedent which is exempt from liability for the payment of debts. *Ward* v. *Cook,* 152 Okla. 234; *In re Thompson's Estate,* 179 Okla. 240. Therefore the title and right to possession which a particular heir acquires in restricted lands upon the death of the owner are not unqualified and may not, practically speaking, be immediate. Their final vesting is dependent upon the probate procedure, which eventuates in a determination of heirship and an order of distribution. *White House Lumber Company* v. *Howard,* 142 Okla. 163; *Oil Well Supply Co.* v. *Cremin,* 143 Okla. 57. While this postponement is more purposeful and vivid in a case, unlike that at bar, in which there is serious doubt as to the identity of the heir, consistency requires that the second sentence of Section 7 be given the same interpretation though there happens to be no such doubt in the circumstances of the particular case.

In the present case, the order of distribution did not occur until more than fifteen months after the decedent's death. In the circumstances, land inherited from a deceased Osage allottee may prop-

erly be said to be withheld from the heir while the probate court performs its function. During the period preceding the order of distribution the lands are protected with respect to liability for the debts of the heir. Since the mortgage here was given and the debt was incurred prior to the probate court's order of September 9, 1938, determining George Pitts to be Mamie Pitts' heir and directing distribution of the estate to him (R. 53), it follows that the mortgage is invalid and cannot be enforced against the lands involved. Petitioner contends (Br. in support of petition, 31) that all that "the sentence does is to postpone the time the creditor of an heir can reach the * * * property * * * until after the administrator is through" with it, leaving the previously-incurred debt and mortgage fully valid. This interpretation, however, is answered by the words of the sentence themselves, which not only provide that the property shall not be "taken and sold" for previously-incurred indebtedness but also that it shall not be "subject to" such indebtedness.

Our view as to the proper construction to be given to the second sentence of Section 7 derives support from the fact that when Congress enacted that Section it was attempting to deal with a serious situation, well known to it, which called for more adequate protection of the Osage Indians. Congress had long been cognizant of the fact that the Osage Indians as a group were inclined to incur indebtedness far in excess of

their income. The situation finally became so onerous that by the Act of March 3, 1901 (31 Stat. 1058, 1065), stringent limitations were placed on Indian traders extending credit to the Osages, and all indebtedness in excess of the limits therein provided was declared to be invalid. The propensity of the Osages toward extravagance was such a widespread trait common to the entire membership that the Secretary of the Interior was directed by the Act of April 21, 1904 (33 Stat. 189, 208), to apply certain tribal or community funds to the liquidation of the outstanding indebtedness of individual members of the tribe. The Indians' weakness, coupled with the reluctance of the merchants and traders to forego the financial advantages accruing to them from this weakness, had the inevitable result of keeping the Indians heavily in debt. Creditors became the real beneficiaries of the quarterly payments made to the Osages.[6] By the time of passage of the 1912 Act, it had become evident that some positive safeguard was needed in order to insure that each individual Indian would actually receive his share of the tribal estate, unburdened by any liability he may have incurred prior to the time such

[6] This unwholesome condition is recognized in the Congressional debates on the bill which became the Act of April 18, 1912 (48 Cong. Rec. 4253), wherein reference is made to the common practice of merchants assembling at the agency on the payment day and taking the Indians' quarterly payments in satisfaction of debts previously incurred.

property was turned over to him. There can be no doubt that this is the policy behind the enactment of Section 7 of the 1912 Act.

III

THE MORTGAGE IS INVALID UNDER SECTION 3 OF THE ACT OF FEBRUARY 27, 1925, 43 STAT. 1008

The Circuit Court of Appeals, since it held the mortgage invalid under Section 7 of the 1912 Act, found it unnecessary to rule upon the Government's further contention that the mortgage, not having been approved by the Secretary of the Interior (R. 54), was illegal under Section 3 of the Act of February 27, 1925, 43 Stat. 1008 (Appendix, *infra*. p. 25), which provides that:

> Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior * * *[7]

In *Pitts* v. *Drummond,* 189 Okla. 574, *supra,* the Supreme Court of Oklahoma held that Section 3 of the 1925 Act did not make the present mortgage

[7] This section was adopted in consequence of this Court's decision in *La Motte* v. *United States*, 254 U. S. 570, holding that a devise of restricted lands by an allottee, made with the approval of the Secretary of the Interior pursuant to Section 8 of the Act of April 18, 1912, 37 Stat. 86, operated as a conveyance of the lands free of restrictions.

invalid. Pitts had relied on *United States* v. *Johnson*, 29 F. Supp. 300 (N. D. Okla.) in which, in holding that Section 3 applied to an unallotted[8] Osage heir of less than one-half Indian blood who had no certificate of competency, the court said that Section 3 defines two overlapping classes of Indians, namely, those of one-half or more Indian blood, presumably without regard to whether they possess certificates of competency, and those of any degree of Indian blood who do not have such certificates. The contention was rejected that Section 3 applies only to Osages of one-half or more Indian blood who have no certificates of competency. The Supreme Court of Oklahoma, however, held that, since Pitts had a certificate of competency, he was excluded from Section 3, which it regarded as inapplicable to any persons who possess such certificates. 189 Okla. at p. 577. The District Court, concluding that Osage legisla-

[8] Section 5 of the Act of March 2, 1929, 45 Stat. 1478, in conjunction with Section 3 of the Act of February 27, 1925, *supra*, extended the requirement of approval of conveyances by the Secretary of the Interior to allotted lands inherited by unallotted, restricted Osage Indians of less than half-blood; for that Section imposed upon them the same restrictions as were previously applicable to allotted Indians of the same degree. Section 3 of the Act of March 3, 1921, 41 Stat. 1249, removed the restrictions from the allotted lands of Osage Indians of less than half-blood; but it did not operate to remove the restrictions from allotted lands subsequently inherited by such Indians from Indians of half-blood or more; for the previous restrictions remain with this land when inherited. *United States* v. *Johnson*, *supra*, at p. 303.

tion generally and the legislative report[9] on Section 3 negatived any Congressional intent to impose restrictions on lands inherited by Osage Indians who have certificates of competency, also held (R. 56–57) that Section 3 was inapplicable to such Indians.

We submit that Section 3 imposes restrictions on the lands inherited by Osage Indians who are of one-half or more Indian blood, such as Pitts, irrespective of whether they have certificates of competency. As the *Johnson* case, *supra,* recognizes, the words of the statute describe two classes of Indians. In the *Pitts* case the court advanced no reason for excluding an Indian who falls within the first of the two classes, but simply stated it was "clear" that the statute does not apply to those possessing certificates. This result is, however, far from clear on the basis of the words of the statute.

It is true that the statute, when given the construction for which we contend, operates to reimpose in part the restrictions which were removed by the provision of Section 6 of the Act of April 18, 1912, which has been discussed above in

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[9] The report states (H. Rep. No. 260, 68th Cong., 1st sess., p. 5):

Section 3: This section provides that lands devised by will, approved by the Secretary of the Interior, and lands belonging to incompetent allottees, shall not be alienated without the consent of the Secretary of the Interior, thus preventing an incompetent Indian from disposing of the land so received without adequate consideration.

its relation to Section 7 of the same Act. Section 6 remains operative, however, with respect to Indians of less than one-half Indian blood who have certificates of competency. Unless the two statutes are thus construed together, the language of the 1925 Act which aptly covers Indians of one-half or more Indian blood who have certificates of competency, would be left without meaning or explanation. Words so plain scarcely admit of resort to extraneous aids to their interpretation. Cf. *Osage County Motor Co.* v. *United States,* 33 F. (2d) 21, 22 (C. C. A. 8).

It is not unreasonable to hold that Section 3 of the 1925 Act applies to Osage Indians who have certificates of competency. As has already been pointed out, *supra,* p. 11, certificates of competency authorize the recipients to alienate their allotted surplus lands only and not their allotted homesteads, and hence do not confer complete capacity in any event. Act of June 28, 1906, Sec. 2, Seventh, 34 Stat. 539, 542. A certificate of competency, moreover, did not free the recipient to alienate inherited allotted land. See fn. 8, p. 18, *supra.* Congress in Section 6 of the 1912 Act did confer such freedom; but that freedom, as we contend, was again withdrawn by Section 3 of the 1925 Act. There is ample legislative precedent for such an enactment. See *Brader* v. *James,* 246 U. S. 88; *United States* v. *Jackson,* 280 U. S. 183.

Accordingly, it is submitted that Section 3 of the 1925 Act does apply to Osage Indians of one-half Indian blood or more who have certificates of competency and that, since the mortgage in question was executed without the approval of the Secretary of the Interior as required by that Section, the mortgage is invalid.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1945.

APPENDIX

Sections 3, 6, and 7 of the Act of April 18, 1912, 37 Stat. 86, are as follows:

SEC. 3. That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage Agency or the Secretary of

the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the county court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: *Provided,* That no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents: *Provided further,* That no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior.

SEC. 6. That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided,* That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the

matter of said partition, and partition of said lands shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees.

SEC. 7. That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall

be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: *Provided, however,* That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid upon order of the county court of Osage County, State of Oklahoma: *Provided further,* That nothing herein shall be construed so as to exempt any such property from liability for taxes.

Section 3 of the Act of February 27, 1925, 43 Stat. 1008, reads as follows:

SEC. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.

U. S. GOVERNMENT PRINTING OFFICE: 1945

SUPREME COURT OF THE UNITED STATES.

No. 520.—October Term, 1944.

Fred G. Drummond, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 5, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Mamie Fletcher Pitts, a full-blood Osage Indian, died on May 24, 1937, leaving land allotted to her as a member of her tribe. Her husband, George Pitts, also a full-blood Osage, was appointed administrator of her estate in appropriate proceedings in an Oklahoma court. His certificate of competency which had been granted him in 1910, § 2, Seventh, Act of June 28, 1906, 34 Stat. 539, 542, was revoked by the Secretary of the Interior on June 24, 1938. On September 9, 1938, he was adjudged to be the sole heir by the Oklahoma court, which entered an order directing distribution of Mamie's estate to him. Prior to that order, however, on July 12, 1937, Pitts had executed a mortgage of his wife's land to Drummond, the petitioner, to secure a contemporaneous promissory note. It is the validity of this mortgage, under the relevant Indian legislation, which is in controversy.

Petitioner in 1939 instituted a suit against Pitts in the state court to recover judgment on the note and to foreclose the mortgage. In that litigation Pitts, asserting the invalidity of the mortgage, was represented by a private attorney. Foreclosure was decreed, and this was upheld in the Supreme Court of Oklahoma. *Pitts* v. *Drummond*, 189 Okla. 574.[1] Thereafter, the United States brought the present action in its own right and on behalf of Pitts to cancel the mortgage and to quiet title. The petitioner succeeded in the District Court, but the judgment was reversed by the Circuit Court of Appeals for the Tenth Circuit. 144 F. 2d 375. The conflict in result between the decision below and the earlier decision of the Oklahoma Supreme Court led us to grant certiorari, 323 U. S. —.

[1] To complete the history of this litigation we note that certiorari was denied, 315 U. S. 814.

A claim of *res judicata* meets us at the outset. Petitioner contends that the adjudication in *Pitts* v. *Drummond, supra,* binds the United States. To escape from the rule that the United States is not precluded from enforcing restrictions on Indian lands by any prior judgment in proceedings to which it was a stranger, *Bowling* v. *United States,* 233 U. S. 528, 534-535; *United States* v. *Hellard,* 322 U. S. 363, 366; and see Cohen, Handbook of Federal Indian Law (1941) 369, petitioner relies on the authorization by the Secretary of the Interior of the employment of Pitts' attorney and the approval of the latter's fee. If the United States in fact employs counsel to represent its interest in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. Compare *United States* v. *Candelaria,* 271 U. S. 432; 16 F. 2d 559, with *Logan* v. *United States,* 58 F. 2d 697. But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy. This is not to be inferred merely because the Secretary of the Interior enables an incompetent Indian to protect his interests.

This brings us to the merits of the controversy—the validity of the mortgage given by Pitts as security for a loan before the Oklahoma court adjudged him to be his wife's heir. The decision turns on the construction of the Act of April 18, 1912, and more particularly on §§ 6 and 7, 37 Stat. 86. Section 6, so far as here relevant, removes restrictions on alienation of land inherited by heirs who have certificates of competency or who are not tribal members. After providing that allotment lands or funds shall not be liable or subjected to any claim arising prior to the granting of a certificate of competency, § 7 continues: "That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs". These provisions have the characteristic infelicity of draftsmanship in Indian legislation which is such a fertile breeder of wasteful litigation. But the language, together with the light shed by the revelant Senate Report, makes the meaning clear enough.

Since Pitts incurred the debt to petitioner before the probate court adjudged him to be the heir, the transaction comes clearly within the invalidation of § 7. Petitioner contends that

even though Pitts incurred the debt to him before the probate court decreed heirship, power to mortgage the land is authorized by § 6 which removed restrictions on land inherited by an heir having a certificate of competency which Pitts did have at the time of the mortgage transaction. But this result would render meaningless the sentence we have quoted from § 7 and disregard the purpose of § 7 as authoritatively stated in the Senate Report proposing the legislation. The object of § 7, according to the Senate Committee, was that "no land or money inherited shall be subject to any prior indebtedness". S. Rep. No. 127, 62d Cong., 1st Sess., p. 2. Since the sentence dealing with the invalidation is preceded by one which gives full protection against debts incurred prior to the issuance of a certificate of competency, the second sentence would have no function whatever unless it be construed to render unenforceable any claims against inherited property arising at any time before it was "turned over" to an heir. And this brings us to the final argument.

It is urged that § 7 is inapplicable because Mamie's land was never "turned over" to Pitts but came to him automatically on the death of his wife. The basis of this argument is that, inasmuch as Mamie was an incompetent, her estate was not subject to any claims against her and therefore necessarily would come to her heir unburdened. But § 7, in speaking of turning over lands to an heir, was surely not concerned with the mysteries of seisin. It dealt with the practicalities of ascertaining ownership through inheritance by appropriate proceedings. To that end § 3 of the Act of 1912 conferred probate jurisdiction upon the state courts. *In re Thompson's Estate*, 179 Okla. 240. The statute, that is, had in mind the judicial process of ascertaining the heir and the completion of that process by court action whereby the land was "turned over" to the ascertained heir. And so here, when the Oklahoma court decreed that Pitts was Mamie's heir, the land in the sensible use of the phrase "turned over" was turned over to Pitts.

Other arguments have not been overlooked but they need not be separately considered.

Affirmed.

Mr. Justice JACKSON dissents.